IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1254

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLEES

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TABLE OF CONTENTS

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STATEMENT

This case involves an appeal from the unanimous decision of the three judge court below (Robb, Circuit Judge, and Gesell and Flannery, District Judges) that Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002, which requires retirement at age 60 for those employees covered by the Foreign Service Retirement System, violates the equal protection guarantees of the Constitution, and that Foreign Service employees cannot be mandatorily retired before the age of 70. This retirement provision applies to employees of the State Department, the International Communication Agency (ICA) (formerly the

United States Information Agency (USIA)) and the Agency for International Development (AID) who are covered by the Foreign Service Retirement System.

As originally enacted in 1946, Section 632 applied only to Foreign Service officers (a small group of employees performing primarily political and diplomatic duties) but over the years the Foreign Service system was expanded to include other State Department employees such as personnel managers, secretaries, librarians, and technicians. USIA teaching, cultural, and information employees were added to the system in 1968 and AID Civil Service employees in 1973.

It is undisputed between the parties that the approximately 10,000 employees who are covered by the Foreign Service retirement system hold a wide variety of jobs.[1] Some are Foreign Service officers in the State Department. These officers specialize in one of four cones: economic, administrative, consular or political. Depending on his or her specialty, at age 60 an officer may be performing (1) economic research and analysis; (2) personnel recruitment, management or other administrative functions; (3) visa and other consular work; or (4) political research, analysis, and negotiations with representatives of foreign governments.

Some of these employees are ICA officers whose jobs range from performing cultural, lecturing, and other information duties, to performing administrative and personnel management functions. Cultural officers es-

[1] Descriptions of the varied jobs performed by Foreign Service employees are set forth in voluminous materials made available to appellees in response to Interrogatory 4.

tablish liaison in other countries with universities and scholarly groups and with symphonies, museums, and other cultural organizations. They also maintain libraries, and arrange for exchanges of students and scholars and for tours of foreign countries by American artists. Information officers establish liaison with the media in other countries, prepare press releases, prepare and distribute filmstrips and maintain film libraries. ICA personnel also provide the staffing for the Voice of America broadcasts and arrange for satellite programming.

Some of these employees are officers of AID which is concerned with providing economic and technical assistance to other countries.

Finally, some of these employees are staff employees (rather than officers) in the State Department and at ICA and AID. These employees include secretaries, clerks, librarians, language teachers, radio and television engineers, and a wide variety of support personnel. Approximately 3,000 of the 9,000 employees in the State Department who are covered by the Foreign Service Retirement System are staff employees.[2]

It is undisputed between the parties that the vast majority of Foreign Service employees hold white collar jobs (teaching, cultural liaison, research, administrative, etc.) similar to those performed by white col-

[2] Appellants' response to Interrogatory 6 stated that as of Jan. 1, 1976, there were 9,031 employees in the State Department covered by the Foreign Service Retirement Systm of which 2,737 were staff employees. The USIA workforce consisted of 1,195 employees of which 143 were staff employees. No figures were furnished with respect to AID.

lar Civil Service employees who are not subject to mandatory retirement because of age.[3]

While the majority of Foreign Service employees serve some time abroad at overseas consulates, trade missions, ICA libraries, or other institutions, this is not true of all Foreign Service employees. Over 1,500 employees are assigned to work permanently within the United States (for example, the employees who are Foreign Affairs Specialists). Others spend the majority of their careers in the States. A sampling from the State Department's Biographic Register for 1974 discloses the wide variations in overseas service among employees and shows that Foreign Service employees who do work overseas spend an average of 15 years abroad (J.S.App. 7A).

Some of the years spent overseas by a Foreign Service employee are spent at embassies in underdeveloped or so-called "hardship" countries. When a country is designated by the United States Government as a "hardship" country, United States government personnel working in that country, including both Civil Service and Foreign Service personnel, are entitled to extra pay. A post may be classified as a "hardship" post for a wide variety of reasons—for example, because of the existence of climatic extremes, or poor quality housing and food in the local native markets, or the absence of adequate cultural amenities. One of the chief reasons for designating a post as a "hardship" post is the absence of adequate elementary and secondary schools for children (Pl. Exs. 3, 4; Ans. to Ints. 31, 32). However, most positions in the Service are in posts which are not designated as hardship ones such as Paris, London and Washington, D.C. Only 22% of State Department Foreign Service Officer positions, 11% of ICA officer positions and 11% of all nonofficer staff positions from all three agencies in the Foreign Service are at hardship posts (Webb. Aff., para. 2).

[3] Civil Service employees were subject to retirement at age 70 at the time this lawsuit commenced. However, Congress recently eliminated this requirement in the 1978 Amendments to the Age Discrimination in Employment Act, PL 95-256, Sec. 5 amending 5 U.S.C. 8335.

Under the Foreign Service Act, Foreign Service officers are subject to annual performance reviews and to selection out from the Service if they rank in the bottom percentages of their class or if they are not promoted within designated periods of time. Foreign Service staff employees are also subject to annual review for promotion purposes and to selection out for unsatisfactory performance but are not subject to selection out on the basis of failure to be promoted. All Foreign Service employees are given biennial medical examinations and are subject to medical selection out if they are unable to accept world-wide assignment. A condition of employment for overseas employees in the Foreign Service is that an employee accept assignment to any post in the world. All Foreign Service personnel have the option of voluntarily retiring with an annuity at age 50 after 20 years of service.

The average age of retirement has been age 55. Because of selections out, medical disqualifications, voluntary resignations, and voluntary retirements, few employees remain in the Foreign Service until their 60th birthday. As of February 28, 1976, there were only 51 officers and staff employees on the employment rolls of the State Department who had been born 59 years earlier (Pl. Ex. 5). The average number of mandatory

retirements of all employees each year in the five-year period from 1970 through 1974 was 44 (Ans. to Int. 2).

Appellee-employees brought suit in the District Court for the District of Columbia claiming a denial of the equal protection guarantees embodied in the Constitution on the ground that the age 60 mandatory retirement provisions failed to meet the rational basis standard of review enunciated by this Court and claiming a right to work until age 70. The appellant agencies filed a motion to dismiss, or, in the alternative, a motion for summary judgment. After submissions of evidence and briefs by the parties, and oral argument, the three-judge district court treated the case, with the consent of appellees, as if it had been submitted on cross-motions for summary judgment.

ARGUMENT

THE THREE JUDGE COURT PROPERLY CONCLUDED, ON THE BASIS OF THE RECORD BEFORE IT, THAT SECTION 632 OF THE FOREIGN SERVICE ACT OF 1946, WHICH REQUIRES FOREIGN SERVICE EMPLOYEES TO RETIRE AT AGE 60, LACKS A RATIONAL BASIS

I

A Classification Based on Age Violates the Equal Protection Guarantees of the Fifth Amendment Unless It Is Rationally Related to a Legitimate Governmental Objective

The three-judge court concluded on the basis of the legislative materials and factual evidence submitted by the parties that the Foreign Service Act of 1946 provision mandatorily retiring Foreign Service employees at the age of 60 violates the equal protection guarantees embodied in the Fifth Amendment.[4] In reaching

[4] The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). See also *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).

this conclusion, the court simply, and properly, applied to the record before it the principles enunciated by this Court in those previous equal protection cases which applied the rational basis standard of review. *E.g., Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

In *Murgia*, this Court ruled that the proper standard for judicial review of a classification based on age is whether it is rationally related to a legitimate governmental objective (427 U.S. at 314). That case involved a challenge to a mandatory retirement age of 50 for the separate branch of the Massachusetts police comprised of uniformed street patrollmen.

This Court reviewed the factual evidence in the record and concluded, on the basis of that record, that a mandatory retirement age of 50 for uniformed policemen was rationally related to the legitimate government goal of protecting the public. It specifically found, for example, that members of the uniformed branch of the Massachusetts State Police were required to perform the most physically demanding and arduous police tasks and that the less physically demanding jobs, such as detective work, juvenile and women's work, and desk jobs, were handled by entirely separate branches of the State Police whose employees did not

have to retire until age 65 but whose positions were not available to members of the uniformed branch. *Id.* at 310, 315, n. 8. This Court noted that the uniformed branch officers participated in controlling prison and civil disorders, responded to emergencies and natural disasters, patrolled highways in marked cruisers, investigated crimes, apprehended criminal suspects and provided backup support for local law enforcement personnel. *Id.* at 310. The Court further stated that it had never been seriously disputed, if at all, that the work of the state uniformed officers was more demanding than that of other state, or even municipal, law enforcement personnel and that it was this difference in work that underlay the earlier retirement age for uniformed policemen. *Id.* at 315, note 8. The Court also pointed to the medical evidence in the record that established that the risk of physical failure, particularly in the cardiovascular system, increases with age and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group. *Id.* at 311. Since the factual record showed that the tasks of the uniformed police branch—controlling riots, apprehending criminal suspects, etc.—were inherently "stress" functions, the Court concluded that "[t]hrough mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police." *Id.* at 314. In short, this Court's holding in *Murgia* is clearly not that all age limitations are reasonable and constitutional but rather only that this issue must be determined on the basis of the record in the particular case.

The present case presents a wholly dissimilar factual situation to that in *Murgia*. This case involves a wide variety of jobs, nearly all of which are white collar desk

positions, and none of which involves physical protection of the public. As we will see, the record shows that there is no rational relationship between the mandatory retirement age of 60 and the work of the Foreign Service.

In the present case, the district court expressly recognized that the issue before it was whether the particular classification based on age was rationally related to a legitimate governmental objective. (J.S. App. 3A). The district court went on to state that the "rational basis standard" means that a legislative provision is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. App. 3A). The district court concluded: "On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (J.S., App. 3A-4A). It properly did not conclude, as this Court did in *Murgia,* that heart attack or any other sudden incapacitating illness on the part of such personnel would present a threat to public safety.

II

The Record Does Not Support Appellants' Claim That Mandatory Retirement at Age 60 Is Rationally Related to Assuring Competence Because of the Uniquely Demanding Nature of Foreign Service Work Overseas

Appellants' principal claim in this case is that Foreign Service personnel work overseas at a variety of posts, that this work entails unusual physical and psychological difficulties, and that, because of these circumstances, their ability to carry out assignments after they reach the age of 60, particularly assignments at so-called "hardship posts", is diminished. They conclude that because of this uniquely demanding nature

of work overseas, mandatory retirement at age 60 is necessary to assure competence in the Foreign Service.

At the outset it should be noted that not all Foreign Service employees work overseas. Some 400 career employees, for medical reasons, family reasons, or other reasons, are not available for worldwide assignment (Ans. to Int. 22). In addition, Foreign Affairs Specialists, who are listed on the employment rolls as Foreign Service Reserve Officers, have not been required or expected to serve overseas even though they have been covered by the Foreign Service Retiremnt System and subject to mandatory retirement at 60.[5] At the present time, there are over 1,000 Foreign Affairs Specialists in the State Department, and an unknown number at ICA. *Department of State Newsletter,* March, 1978. Appellants' claim of a rational basis for the statute because of conditions overseas is, therefore, wholly inapposite to this group of Foreign Service employees.

Even as to those employees who spend some of their careers overseas, appellants have submitted no empirical evidence to support their claim. They have relied instead on conclusory statements in legislative materials, and on conclusory statements and personal opinions of their own personnel officers, that older Foreign Service employees are less able to perform work over-

[5] ICA personnel regulations dealing with foreign affairs specialists are set forth in Manual of Operations and Administration, V-A/V-B-1000, Sec. II, and in various circulars. Circular 487D, Dec. 19, 1977, deals with Domestic Specialists "who are assigned to a position in the United States and are expected to continue to serve in the United States." Appellees understand that foreign affairs specialists at ICA are currently being given the option to convert to Civil Service status and that an undetermined number are expected to do so. Those who do not will still be subject to mandatory retirement at age 60.

seas than younger employees because of the difficult conditions existing overseas (Gov. Ex. 2; Wortzel Aff.). Appellees, on the other hand, submitted extensive statistical, medical, and other documentary evidence, as well as affidavits, including affidavits of experts and disinterested persons, to refute appellants' claim and to demonstrate that there is in fact no correlation between working overseas in the Foreign Service and ability to perform that work between the ages of 60 and 70. Appellants did not deny the validity of most of appellees' factual submissions and did not submit evidence of their own to counter them.[6]

In this appeal, appellants (1) continue to maintain (Gov. Br. 12-26) that mandatory retirement at age 60 is necessary to ensure a competent workforce since competence to perform work overseas in the Foreign Service is diminished after the age of 60, and (2) claim (Gov. Br. 6) that the district court below erroneously decided the case on the basis of a record that was "limited".

We will now show (A) that the evidence in the record overwhelmingly demonstrates that there is no validity to appellants' claim of diminished competence even as to those employees working overseas; (B) that the evidence on this issue is adequate to support the district court's conclusion to that effect; (C) that the conclusory statements in the legislative materials cited by appellants are largely inapposite and, in any event, do not provide a factual basis for the retirement provision; and (D) that the district court properly applied

[6] As we will see, the only aspect of appellees' evidence that appellants even attempted to refute with statistical or other data was that relating to the number of Civil Service employees working overseas under conditions comparable to that in the Foreign Service.

the rational basis standard of review formulated by this Court to the record in this case.

A. The Uncontradicted Evidence in the Record Shows That There Is No Factual Basis for Appellants' Assertion That Mandatory Retirement at Age 60 Is Necessary to Assure Competence Because of the Uniquely Demanding Nature of Overseas Work in the Foreign Service

In this case, no empirical studies have ever been made concerning the nature of Foreign Service work similar to those relied on by the State of Massachusetts prior to establishing the mandatory retirement law for uniformed policemen which was challenged in *Murgia*. (427 U.S. at 314,316, notes 7, 9). No medical, statistical, or other objective evidence was compiled either before enactment of the mandatory retirement provision in 1946 (or before enactment of its earlier analogous provision relating to consular and diplomatic service officers in the Rogers Act of 1924) or in subsequent years as additional categories of employees were brought under the Foreign Service Act. Moreover, appellants have submitted none in this case.

Appellants rely here, as they did below, on conclusory statements concerning unfavorable conditions existing overseas that they have located in scattered fragments of legislative materials. As we will see in subsection (c) of this Argument, these legislative statements were not made in connection with the mandatory retirement provision and, in any event, are not based on any underlying studies or facts. Appellants have stated (Ans. to Int. 36) that beyond these legislative statements

> [t]he study which is specifically directed to the reasons and basis for the mandatory retirement provision as such is reflected in the letter of July 28, 1975, from the Director General of the Foreign Service to the Civil Service Commission (Gov. Ex. 2).

The letter to the Civil Service Commission gives a list of reasons why in appellants' opinion employees above the age of 60 do not have the necessary physical stamina and intellectual vitality to perform effectively their jobs. No medical, statistical, or other facts are cited as support for the opinions.[†]

Appellees submitted factual evidence to counter each and every allegation in appellants' letter to the Civil Service Commission. This point by point rebuttal is summarized in Plaintiffs' Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery and Present Further Evidence if Defendants' Motion to Dismiss is Denied and if Judgment for Plaintiffs Cannot Be Rendered on the Present Record, filed February 1, 1977. Appellees' evidence consisted of statistical and other documentary evidence based on information provided by appellants from Foreign Service records in response to interrogatories, the State Department's *Biographic Register* for 1974, and other published documents, and the published statistics and records of other government agencies. Appellees also

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[†] Subsequently, in response to the district court's request for additional evidence concerning the factors underlying the retirement provision, appellants submitted the affidavit of their personnel director, Arthur Wortzel, which repeated some of the statements in the letter to the Civil Service Commission and set forth his opinion that those statements were correct. Again, no factual evidence was cited to support that opinion.

submitted affidavits from Dr. David Kessler, a former member of the medical staff of the Foreign Service, from Dr. Joseph English, the former Chief Psychiatrist for the Peace Corps and later an Assistant Secretary of Health, and from Dr. Alfred Munzer, a pulmonary specialist. Appellees also submitted an affidavit from Thomas Fox, executive director of Volunteers in Technical Assistance, a non-profit organization which provides technical assistance to countries throughout the world, and from Ambassador Barall, a former career Foreign Service officer. The affidavits of several of the plaintiffs in this case were also submitted.

Appellees' evidence demonstrates, *inter alia,* that working overseas generally, and working overseas in the Foreign Service specifically, does not impair the ability of older Foreign Service employees to perform their jobs to any greater extent than it does that of younger employees (Kessler Aff., para. 3; Fox Aff., para. 3); that, indeed, Foreign Service employees are less likely to be disqualified from overseas assignments than are younger members with young families (Barall Aff., paras. 2, 4); that older employees between the ages of 55 and 60 service in hardship posts in approximately the same proportion as do all employees (Webb Aff., paras. 2, 3); and that there is no medical relationship between aging and the ability to live and work in countries that are underdeveloped or have climatic extremes. (Munzer Aff., paras. 2-4).

Appellants submitted no evidence in response to these submissions by appellees. Here, on appeal, they merely repeat some of the unsupported allegations made below. For example, appellants allege (Gov. Br. 22) that "the perils and discomforts to which Foreign Service personnel are exposed have not materially di-

minished since 1941 when Secretary Hull wrote of the 'unhealthful conditions' [and] the 'extremes of climate'." Appellants cite no evidence for this statement. The undisputed medical evidence in the record, however, is that world health standards have improved (Munzer Aff., para. 3). In addition, the undisputed medical evidence in this record is that Foreign Service personnel are generally in good health, are innoculated before going overseas, and, with the exception of dysentery, do not usually contract the infectious diseases still prevalent abroad. (Kessler Aff., para. 2; Munzer Aff., para. 3). This has also been the practical experience of Foreign Service officials who have served in underdeveloped countries (Barall Aff., para. 6). In any event, the undisputed medical evidence in the record is that none of the specific diseases or illnesses set forth in the letter to the Civil Service Commission as a basis for mandatory retirement—undulant fever, dysentery, hepatitis, typhoid, and tuberculosis—are age-related, and to the extent they do occur, they occur to Foreign Service employee and their dependents at all ages (Kessler Aff., para. 2; Munzer Aff., para. 3). The undisputed medical evidence submitted by appellees from a pulmonary specialist is that there is no medical relationship between aging and the ability to live and work in countries that have extremes of climate or atmosphere and that, in addition, respiratory ailments are more likely to develop or be aggravated in individuals living and working in Washington's highly polluted summer climate than they are to develop or be aggravated in most underdeveloped countries or countries having high altitudes (Munzer Aff., paras. 2, 4). The affidavit of Ambassador Barall also notes that, even in the most remote posts, Foreign Service employees live and work in well heated and air-

conditioned facilities. Moreover, the undisputed evidence in the record is that, since the original establishment of the Foreign Service, medical facilities have been established at nearly every post sufficient to take care of usual health problems. In addition, when specialized care is needed, the government provides transportation by air ambulance to major medical centers at no cost to Foreign Service employees (a service not ordinarily provided Civil Service employees working in the United States) (Barall Aff., para. 3; Wells Aff., para. 4; Cardoso Aff., para. 2).

Amicus American Foreign Service Association alleges (AFSA Br. 12) that medical problems may be cumulative after long years of overseas service, but cites no evidence that medical problems accumulate as a result of working overseas. The undisputed medical evidence in the record is that longterm medical condition is not ordinarily affected by occurrences of diseases still prevalent in some parts of the world (Munzer Aff., para. 3).

Moreover, not all overseas tours are spent in underdeveloped countries or other posts designated as hardship locations. Many overseas tours are spent in such non-hardship posts as Rome, Paris, and Nassau. In fact, the record shows that only 22% of all Foreign Service officer positions, 11% of all ICA officer positions, and 11% of all staff positions are at hardship posts (Webb. Aff., para. 2, summarizing Ans. to Ints. 29-33).[8] Appellants now assert (Gov. Br. 22) that of the Foreign Service personnel abroad at any given time, nearly 50% are serving in hardship locations, but cite no authority for this statement. Even if we assume,

[8] By way of contrast, 80 of 286 Agriculture Department employees overseas in 1975 (or 28%) were located at hardship posts.

arguendo, that this statement is true, it does not show that Foreign Service employees suffer cumulative effects because of such service. Foreign service employees who are unable to perform the work of the Service because of health problems are separated on that account but the evidence shows that medical separations occur at all ages. (Ans. to Int. 16). No employee is sent to a hardship post unless he or she has first been medically cleared for the assignment (Ans. to Int. 35). Presumably, if older employees are less able physically than younger ones to perform work overseas at hardship posts because of the cumulative effects of work in the service, the record would show that they are assigned less often to such posts. However, the evidence shows that older employees between ages 55 and 60 serve at hardship posts in approximately the same proportion as younger employees (Webb Aff., para. 2-3). The affidavit of appellants' personnel director, Arthur Wortzel, states that replacement of Foreign Service personnel at overseas posts is costly to the Service but cites no evidence that older Foreign Service workers (who, like younger employees, receive prior medical clearance for specific overseas assignments) are more likely to require replacement than younger employees. In fact, the uncontradicted statement of Dr. Kessler, a former physician on the Foreign Service medical staff, is that while occasionally Foreign Service employees need to be evacuated to major medical facilities for specialized care,

(Def. Supp. Mem. with Respect to Def.' Response to Request for Information, pp. 4-6).

this event occurs to employees, and their dependents, at all ages (Kessler Aff., para. 3).[9]

Assuming, *arguendo,* the validity of appellants' statement (Gov. Br. 25) that increasing age brings with it increasing susceptibility to physical difficulties, there is no evidence in this record that such susceptibility interferes in any significant way with accomplishing the work of the Service. As a matter of logic, this argument of appellants would justify mandatory retirement of thirty year olds in favor of teen-agers irrespective of any capability of thirty year olds to perform the work involved. Unlike the situation in Murgia, the physical demands of the Foreign Service do not require youth, nor would sudden incapacitating illness present any risk to public safety.

Appellants further allege (Gov. Br. 22) that "the dangers of foreign wars [and] of civil strife" continue to exist in the Foreign Service and that "the threat of terrorist activity has grown in many areas." However, the undisputed expert witness testimony in the record is that terrorist attacks occur rarely and, when they do occur, they are not aimed at older aged employees more than the younger ones (Barall Aff., para. 11).[10] The

[9] Plaintiff Wells, for example, had to be flown from Vietnam to Clark Field in the Philippines for surgery at the age of 50 when "My 'trick knee'—from high school athletic days—locked while I was doing the tarantella with the wife of the Italian military attache" (Wells Aff., para. 4).

[10] Indeed, Ambassador Barall, surmised that statistically there is a greater possibility of criminal attack on the streets of Washington for the thousands of civil service employees who work here (and who can continue to work after the age of 60) than there is possibility of terrorist or wartime attack on Foreign Service personnel overseas. Moreover, Ambassador Barall noted that For-

appellants' own record supports this fact for the Service commonly sends its most important officials—its ambassadors (who are not subject to the age 60 retirement provision)—into some of the most dangerous overseas posts after the age of 60. Ellsworth Bunker, for example, served as ambassador to Vietnam at the height of the Vietnam War at the age of 73. State Deparement *Biographic Register* (1974 ed.). The undisputed evidence in the record shows that Foreign Service employees are not policemen, are not even armed, and are not expected to resist or counter terrorist attack of other violence (Barall Aff., para. 11; Wells Aff., para. 6).

The appellants state (Gov. Br. 22-23) that Foreign Service employees must be mobile and accept assignments to different posts. However, the appellees submitted the uncontradicted testimony of experts that older workers working overseas have no more difficult adjusting to changed conditions than younger ones (English Aff., para. 3; Fox Aff., para. 3) and that the psychological stresses of isolation or of establishing a new household in a new setting are ordinarily far greater for Foreign Service employees when they are young or have young children than when they are older and their children are grown (Barall Aff., para. 2).

Amicus AFSA (AFSA Br. 16) repeats the claim made below by appellants that living and working con-

eign Service employees are provided with guarded homes and personal armed guards, if necessary, a protection not ordinarily afforded civil servants in Washington.

ditions are less favorable overseas than in the United States. However, even at the so-called "hardship posts", the evidence in the record shows that the hardship conditions cited in the government's letter to the Civil Service Commission (Gov. Ex. 2)—poor housing, limited variety, poor quality, and unsafe foods, substandard sanitary conditions, etc.—largely existed in the past and, in any event, are largely inapplicable to Foreign Service employees. Thus, while adequate housing and sanitary facilities may be in short supply, and large segments of the local population may live in substandard housing with substandard sanitary facilities, the uncontradicted evidence in the record is that housing and sanitary facilities for Foreign Service employees are never substandard and are frequently superior to that enjoyed by Civil Service employees in the United States (Barall Aff., para. 9; Olsen Aff., para. 6; Van den Berg Aff., para. 5; Wells Aff., paras. 4, 5). For example, appellee, Mary Cardoso, a secretary, and her husband, were provided with a two-bedroom air-conditioned apartment in Zanzibar, complete with two fulltime servants and use of the embassy swimming pool and tennis courts (Cardoso Aff., para. 3). Appellee Olsen's affidavit states that "[t]he housing has been better than what I could have obtained in the United States for the same price" (Olsen Aff., para. 6). And while there may be a limited variety and quality of food available in local markets, the record shows that Foreign Service personnel usually have the use of United States government commissaries as well as the use of airplanes which fly in fresh food from nearby posts (Barall Aff., para. 10).

The most that can be said for the claim that living and working conditions overseas are less favorable than

those in the States is that it is a highly subjective one, and judgments can and do differ with respect to it. Ambassador Barall, for example, pointed out that many of the hardship posts have other amenities not available to the majority of Washington civil servants —for example, low-cost household help, unpolluted beaches and air, private swimming pools and tennis courts paid for by the U.S. government, inexpensive liquor and food, slower pace of life, and high social status in the local community (Barall Aff., para. 9-10).

Finally, appellants claim (Gov. Br. 23) that Foreign Service employees are unique because they devote a substantial part of their careers to overseas duty. We submit that the question of whether or not Foreign Service employees work overseas for greater periods of time than other government employees is irrelevant since the appellants have failed to show a correlation between working overseas and diminished physical and mental capacity to work between the ages of 60 and 70. Nevertheless, in response to the district court's request, the parties submitted evidence that far larger number of Civil Service employees work overseas (58,489) than Foreign Service employees (4,787).[11] These employees work for such diverse agencies as the Department of Defense Teachers Corps, the U.S. Travel Service in the Department of Commerce, the Immigration Service, the Foreign Agricultural Ser-

[11] The figure of 58,489 was provided by appellants to the court below in response to its request (J.S. App. 4A). Appellants now state (Gov. Br. 24, note 26) that a 1977 Civil Service Commission report shows that the figure is actually twice that large and that, when employees in United States Territories are included, the figure is 134,000.

vice, the Federal Aviation Agency and numerous other agencies. These Civil Service employees are not subject to mandatory retirement at age 60.[12] Appellees introduced evidence that an individual Civil Service employee is as likely to spend a significant portion of his career overseas as is a Foreign Service employee. The appellants dispute this fact (Gov. Br. 23-24), but they declined below to submit comparative evidence concerning the amount of time worked overseas by Civil Service employees on the ground that data was not readily available and would be too burdensome to produce (J.S. App. 7A). As the district court noted (J.S. App. 7A) appellees' evidence showed that employees of the Foreign Agricultural Service (who do not have to retire) serve overseas in approximately the same manner and for nearly the same number of years as Foreign Service employees. Appellees also introduced Defense Department publications which showed that civilian employees of the Defense Department's Overseas Dependent Schools program—including librarians, teachers, guidance counsellors, social workers and psychologists—who are not subject to mandatory retirement, and who are required to accept assignments to any overseas posts in the world, are employed through the world and that many have in fact worked continuously abroad for 15 to 28 years (Pl. Response, to Def. Response to Request for Infor-

[12] Many Civil Service blue collar employees who do not work overseas are, however, engaged in arduous occupations—for examples, mine inspection, ammunition, explosive and toxic material work, sandblasting, industrial cleaning, and tunneling. *Civil Service Handbook*, Civil Service Commission (1976). Yet, none of these employees are subject to retirement at age 60.

mation, and exhibits referred to therein, filed June 1, 1977).[13]

We submit that the district court correctly concluded from its analysis of the statistics and other evidence in the record that large numbers of Civil Service employees work overseas in jobs comparable to those of workers in the Foreign Service (J.S. App. 7-10A). However, we further submit that the number of Civil Service employees working overseas is not the dispositive issue in this case. As we have noted, appellants have failed to show any evidence of a correlation between working overseas in the Foreign Service and diminished capacity to work between the ages of 60 and 70. Appellees, on the other hand, have submitted substantial evidence, which was not factually rebutted, that there is no correlation between overseas work and diminished capability to work between the ages of 60 and 70. Consequently, even if the record failed to show that any Civil Service employees worked overseas, the record would still be barren of any evidence that the age 60 retirement provision has a relationship to ensuring competence in the workforce. The fact that large numbers of Civil Service employees do work overseas, that

[13] Appellants are mistaken when they state (Gov. Br. 24) that a Defense Department regulation limits the overseas tenure of Defense Department employees to a term of five years. The regulation cited does not apply to all Defense Department employees. The 7,500 employees of the Defense Department's Overseas Dependent Schools program, for example, are not subject to the regulation as appellees' Exhibits 7-10 indicate. In addition, even those civilian employees who are limited to five-year tours are allowed to return overseas for subsequent five-year tours after serving intervening tours in the United States.

many of them work in hardship posts, and for periods of time comparable to periods served by Foreign Service employees, and work between the ages of 60 and 70, and above 70, is merely additional evidence that the age 60 retirement provision lacks a rational basis.

B. The Record in This Case Concerning the Ability of Persons Over Age 60 to Perform Foreign Service Work Overseas Is Adequate

Appellants claim (Gov. Br. 6) that the district court reached its decision in this case on the basis of a record which is "limited". They are in error.

One month after filing their complaint, appellees served an initial set of interrogatories on appellant government agencies (Docket Item No. 3). Although appellants initially resisted answering, these interrogatories were ultimately answered 7 months later. Appellees then attempted to serve additional interrogatories, to take depositions, and to present testimony of witnesses for the purpose of supporting their contention that there was no rational basis for the age 60 retirement provision. The government agencies opposed the answering of further interrogatories (Docket Item No. 25) or the taking of depositions, and insisted that the case could be decided by the district court on the basis of the government's motion for summary judgment (Tr. 4).

Subsequent to a hearing on the government's motion, the district court issued an order on December 3, 1976 (Docket Item 34), stating that the record relating to the rationality of the classification challenged appeared to be incomplete, particularly with respect to the factors underlying its congressional enactment. The parties were requested to supplement the record with additional affidavits which was done on February 1, 1977. Subsequently, the district court requested additional factual information which was furnished by the parties (Docket Nos. 43, 47-49).

Appellees contended throughout the proceeding below that, if they were given the opportunity to proceed with additional interrogatories, the taking of depositions, and the introduction of witness testimony, they would be able to introduce further evidence that overseas work does not diminish the ability of Foreign Service personnel to perform their various jobs. For example, appellees stated that they wished to obtain statistical date from the medical division of the defending agencies in order to support their contention (already supported in affidavits) that proportionately more Foreign Service employees under the age of 50 are medically disqualified from serving at hardship posts than are employees over the age of 50, and that proportionally more employees under the age of 50 are given medical discharges for psychological and psychiatric health problems than are employees over the age of 50 (Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery, filed February 1, 1977, pp. 2-3).[14] Appellants contended throughout the proceeding that the case should be de-

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[14] The appellants declined to furnish statistical information from their medical records which was requested by appellees in the first set of interrogatories on the ground that it would be burdensome to comply (Ans. to Int. 18). They declined to furnish the names of doctors on their medical staff, which were requested by appellees in the second set of interrogatories, on the ground that the information would not be relevant to the suit (Def. Obj. to Int. Docket No. 25).

cided on the basis of the existing record and that the Court should grant their motion for summary judgment.

During oral argument, the Court asked appellants' counsel if the appellants would want to submit additional factual evidence if the court treated the case as one which involved mixed questions of fact and law and not merely of law as appellants claimed. Appellants' counsel stated that they would not (Tr. 44).

Although the district court expressly invited the parties, even after oral argument, to submit additional factual evidence to support their contentions, "particularly as to the factors underlying congressional enactment" (Order of Dec. 3, 1976) appellants submitted only the conclusory affidavit of their own personnel director that in his opinion some of the statements made in the government's Exhibit No. 2, described above, were correct.

Appellees contended after oral argument, in their Memorandum of Feb. 1, 1977, referred to above, that, given the slim factual showing by appellants to support their claim, and the extensive factual evidence introduced by appellees to rebut it, the district court had before it sufficient evidence to demonstrate that there was no rational purpose for the retirement provision (Memorandum in Support of Motion for Order Permitting Plaintiffs to Engage in Discovery, *supra,* pp. 3-4). Appellees stated that, if the court agreed with this view, they would waive their right to further discovery and would consent to the court treating the case as if submitted on cross-motions for summary judgment. *Id.* Appellees insisted, however, that if the court did not agree that there was sufficient evidence

to find for appellees, they wanted, and were entitled to, the opportunity to proceed with discovery and the opportunity to introduce additional evidence. *Id.* at 4.[15]

The three-judge court subsequently considered the Department's claim that a lowered retirement age was related to assuring competence because of overseas conditions on the basis of the legislative history and the factual record submitted by the parties. Contrary to appellants' complaint in this appeal (Gov. Br. 6) that the district court decided the case on the basis of "a limited record", the record as to this claim was limited only to the extent that appellants chose to do so. Appellees submitted extensive evidence. They would have introduced even more had not appellants refused to answer appellees' second set of interrogatories, opposed the taking of depositions or presentation of witness testimony, and moved for summary judgment on the basis of the existing record. Appellants cannot now justifiably complain that the record was "limited" and that the court below committed reversible error in ruling upon it.

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[15] Appellants are correct (Gov. Br. 5, note 6) that appellees did not formally move for summary judgment at the time of the oral argument on the government's motion for summary judgment. The court's opinion below is in factual, although not material, error on this point. The court's opinion states that "plaintiffs moved for summary judgment at oral argument" (J.S. App. 2A). The word "at" should read "after."

The court's order of Dec. 3, 1976, which ordered the parties to supplement the record, stated that the court reserved the right to treat the matter as if submitted on cross-motions for summary judgment. It was in response to this order that appellees submitted additional factual evidence and filed the memorandum of February 1, 1977, discussed above in the text.

C. The Conclusory Statements in Legislative Materials Do Not Provide a Rational Factual Basis for the Retirement Provision

Appellants contend (Gov. Br. 8-9) that legislative materials show that Section 632 of the Foreign Service Act of 1946 was enacted by Congress because of the uniquely demanding nature of Foreign Service work. In fact, the history of the various statutes cited does not support this contention.

The 1946 Act was a major reorganization of the State Department's personnel system designed to maintain it as an elite career Foreign Service in which university-educated young men would enter on the basis of competitive examination and would be advanced by merit to the top officer ranks. Although the Act has been amended in minor respects from time to time, it has provided the basic framework for the Foreign Service career officer system to this day.

Section 632, the mandatory retirement provision, is only one relatively small section of the Act which consists of 197 provisions and consumes 158 printed pages in the United States Code.

It is undisputed between the parties that there is no statement in the 1946 Act, or in the reports and debates relating to the Act, that Section 632 was enacted because post-60 year olds were not able to perform the work of the Foreign Service.[16] Appellants argue (Gov.

[16] The House Report on the 1946 Act, H.R. Rep. No. 2508, 79th Cong., 2d Sess. (1946) states: "In general the retirement age is lowered from 65 to 60."

A reference to the fact that selection out was not to be extended to Class 1 Officers because mandatory retirement would achieve the desired turnover in that class was the only other reference to

Br. 13-15) that it does not matter that there was no reference to this issue in the 1946 legislation establishing an age 60 retirement requirement because the 1924 Rogers Act had provided for an age 65 retirement. We submit that appellants' reliance on the 1924 Rogers Act is misplaced.

The purpose of the Rogers Act was two-fold: to merge the Diplomatic and Consular positions in the State Department into a combined Foreign Service, and to improve the salaries and other working conditions of officers holding those positions in order to recruit able persons on the basis of merit rather than on the basis of personal wealth. As the Act's author, Congressman Rogers, stated: "This bill, for the first time in the history of the United States, will make the [Diplomatic] Service available to the poor man." 65 Cong. Rec. 7564 (1924).

An important feature of the Act was the establishment for the first time of a retirement system for employees in the Consular and Diplomatic Services. Until the Rogers Act, such employees received no pension or other compensation upon retirement. They also were not required to retire at any age. The portion of the congressional debate on the Rogers Act quoted by appellants (Gov. Br. 14) omits the preceding paragraph in which Congressman Rogers discussed the age 65 mandatory retirement provision and explained that its purpose was to entitle Service employees to retire and to receive a pension upon retirement.

> Mr. Rogers. There never has been a retirement system for the Foreign Service. We retire our

the mandatory retirement provision in the report (*Id.* at 91). This reference will be discussed in greater detail in Part III of this Argument.

Army officials and our Navy officials. We retire our judges. We retire all these three services without exacting any contributions from the beneficiaries. We retire the civil-service employees of the Government, but we exact 2½% from these men out of their salary. In this bill we say that the principle of retirement is so firmly established in this country in almost every other Government activity that there seems no reason why we should not extend it to this additional realm of Government activity.

We say this—and in my judgment it is too niggardly, but we wanted to present a bill that would certainly meet with the approval of the House—we say to the Foreign Service men, "You must contribute 5 percent of your salary." I think the analogy of the Foreign Service officer to the Army officer and to the naval officer is much more complete than to the civil-service employee in Washington.

The Foreign Service officer is going hither and yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States. Yet we say that we will not treat him as we do Army and Navy, which are upon a noncontributory basis. We will not do for them what Great Britain does, by retiring her Foreign Service men on two-thirds pay without exacting contributions. We will not even do for them what we do for the civil-service employees of the Government in requiring them to pay but 2½%. What we do for the Foreign Service officials is to take 5% of their salary; but on the other hand—and I think you will agree that we could not do less—we remove the artificial provision which provides a maximum annuity of $720.

MR. CELLER. You make the retiring age 65 years?

MR. ROGERS. Sixty-five.

MR. CELLER. And the clerk in Washington in the field service is retired at 70 years of age?

MR. ROGERS. * * * There is added a provision that the Secretary of State may retain any man for five years if he finds it wise for the country to retain him.

I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65. (Applause.)

This exchange with Congressman Celler was the only reference in the debate to the age of retirement other than the debate on the amendment to raise it to age 70 referred to by appellants (Gov. Br. 15, n. 15)."[17] The focus of the debate was the need for better salaries, representational allowances, and a retirement system, in order to attract qualified persons of modest means into the Service. Similarly, Congressman Rogers' remarks quoted above show that the primary purpose of the 1924 retirement provision was to establish a fair retirement system under which Diplomatic and Consular Service officers could retire and receive pensions and that it was only incidentally concerned with the age at which officers would be entitled to retire. Moreover, since there was no voluntary retirement provision in effect at the time or provided for in the Rogers Act, the exchange, while it is not without ambiguity, appears to show Congress' belief that State Department personnel working overseas deserved the advantage of retiring at

[17] The amendment to raise the age to 70, and the debate thereon (65 Cong. Rec. 7586), was concerned exclusively with whether the cost of the retirement fund would be too high if Foreign Service employees were permitted to retire voluntarily and receive a pension at age 65.

age 65 rather than age 70 (the Civil Service retirement age) because of the difficult and nomadic life that was required of them, and in order to give them the economic means to return and establish themselves in their homeland.

However, even if Congressman Rogers' remark that "the country was better off to retire them, as a general rule, at 65" is taken as meaning that persons over this age are no longer qualified to carry out the duties of the Foreign Service, this hardly demonstrates a rational basis for the mandatory age 65 retirement provision in the Rogers Act. The legislative history of the Act contains no information supporting any such conclusion and appellants have submitted no evidence on this point.

In any event, even if it is assumed, *arguendo,* that there was a factual basis justifying a mandatory retirement age of 65 in 1924, there was no such evidence justifying a mandatory age of 60 in 1946. Even if we assume that the quoted exchange between Congressmen Celler and Rogers reflects a belief on the part of the 1924 Congress concerning the competence of post 65 year old Consular and Diplomatic Service officers working overseas, it should be recalled that appointments and promotions of persons in the Service prior to that time had generally been made on a political basis without regard to qualifications.[18] In addition, the absence

[18] The spoils system of appointing and promoting diplomatic officers existed until after World War I. Diplomatic officers served for little or no pay and tended to have short tenures. Consular officers were salaried. These and other facts concerning the historical origins of the Foreign Service are set forth in Stein, *The Foreign Service Act of 1946* (Committee on Public Administration Cases—1949); Jones, *The Evolution of Personnel Systems for U.S.*

of any retirement system for salaried consular officers prior to 1924 tended to prolong their tenure and it can be assumed that this included officers who were no longer physically or mentally able to perform the work required (if indeed they had ever been equipped to do so). Finally, neither before 1924 nor after it, was there selection out for poor performance, for medical reasons, or any other system to weed out those in the Services whose energies had declined with advancing age. Thus, any assumption that the retirement age was set at 65 in 1924 as a means of ridding the Department of incompetent employees would not be relevant to ascertaining the legislative purpose in 1946 when the Congress established a Foreign Service system of appointing and promoting on the basis of merit, and of selecting out on an annual basis those who were not able to carry out their responsibilities adequately.

Moreover, it should be recalled that, in 1924, the general conditions of society were such that a retirement age of 65 would have been viewed as bearing a rational relationship to the abilities of individuals generally to continue working. The average life expectancy in 1924 was only 58 (Division of Vital Statistics, U.S. Public Health Service). Moreover, overseas work in the Diplomatic and Consular Services—particularly in the tropics referred to by Congressman Rogers—had to be carried on without modern-day luxuries. By 1946, the average life expectancy had risen to 64 and overseas work in the Foreign Service involved far more amenities.

Foreign Affairs, A History of Reform Efforts (Carnegie Endowment for International Peace 1965).

Thus, the legislative history of the mandatory retirement age of 65 adopted in the Rogers Act in 1924, even if it were far stronger than it is, could not possibly support the mandatory retirement age of 60 included in the Foreign Service Act of 1946.

As the evidence concerning modern day working conditions in the Foreign Service summarized above shows, this lack of any rational relationship between a mandatory retirement age of 60 and the need for a competent Foreign Service is even more clear today than it was in 1946. As Mr. Justice Stone wrote for this Court in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938): "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing * * * those facts have ceased to exist." The average life expectancy, as of 1976, is 72.8. As the evidence in this record concerning overseas conditions shows, Foreign Service employees today—in the tropics and elsewhere—have air-conditioned offices, cars and government-supplied housing, government-furnished airplane transportation, government furnished inoculations against those contagious diseases which are still prevalent, and government-furnished medical facilities for any illness which does occur. Thus, as life expectancy has substantially increased and overseas conditions have steadily improved, the retirement age in the Foreign Service has been lowered from no retirement age at all (prior to 1924) to age 65 (the Rogers Act) to age 60 (the 1946 Act) without any justification for doing so.

Defendants rely (Gov. Br. 18-19) on the legislative history of statutes transferring categories of civil service employees to the Foreign Service retirement system

subsequent to the 1946 Act as providing the basis for the 1946 retirement provision.[19] The legislative history cited by appellants shows that Congress was concerned primarily with the merits of transferring the category of civil service employees into the Foreign Service retirement system (rather than with the issue of retirement age). The issue before the Congress in each instance was whether the employees should be transferred to the Foreign Service and Disability Retirement System for purposes of pay, promotion, rank, and retirement, or continued under the Civil Service system.

Congress accepted the State Department's recommendation that the new employees be placed as nearly as possible on par with existing Foreign Service employees and made subject to comparable pay, promotion and retirement provisions. H. Rep. No. 2104, 86 Cong., 2d Sess. (1960); 106 Cong. Rec. 17071 (1960) (remarks of Rep. Hays); Hearings on Amendments to the Foreign Service Act before the Subcommittee on

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[19] The original concept of the Foreign Service as an elite group of well educated officers who would be chosen to start at the lower ranks on the basis of competitive examinations and interviews and be promoted on the basis of merit to perform highly specialized diplomatic tasks, has been significantly changed over the years as employees have been added to the Foreign Service through routes other than that of the Foreign Service competitive examination. For example, from 1954 to 1956, large numbers of career civil service employees in the State Department were transferred by lateral entry into the Foreign Service. These employees increased the numbers in the Foreign Service threefold. Jones, *supra*, at 82. In 1968, United States Information Agency civil service employees (82 Stat. 812) and in 1973 AID personnel (87 Stat. 722) were brought into the Foreign Service. The Foreign Service was also expanded in 1960 and again in 1976 to include Civil Service staff employees such as secretaries, librarians and language teachers. 74 Stat. 535; 90 Stat. 834.

State Department Organization and Foreign Operations of the House Foreign Affairs Committee, 86th Cong., 2d Sess. 155, 158 (1960); 113 Cong. Rec. 32184-32185 (1967) (remarks of Sen. Ellender); H. Rep. No. 1632, 90th Cong., 2d Sess., 3 U.S. Cong. & Admin. News 3477 (1968).[20] Neither House voted on the appropriateness of the retirement age during consideration of any of these measures. Nor is there any indication in the legislative history that Congress considered any evidence on the issue of whether Foreign Service employees were competent to carry out their responsibilities past age 60. In sum, these post-1946 statutes provide no additional support for the 1946 Act.

In addition to reliance on the legislative statements made in connection with the 1924 Rogers Act and in connection with the legislation transferring categories of employees to the Foreign Service System, appellants suggest (Gov. Br. 16-17, 18) that there have been independent studies concerning hardship conditions over-

[20] The legislative statements cited by appellants (Gov. Br. 19) relating to incorporation of additional groups of Civil Service employees have to be read in context. For example, the complete statement in the 1973 report on incorporation of AID employees into the Service cited by appellants is "[t]he Foreign Service system provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service. It has several advantages over the Civil Service provisions: (1) Foreign Service personnel may retire at age 50 with 20 years of service * * * while Civil Service personnel may retire at age 55 with 30 years of service. * * *." The import of this statement is that because of the requirement that they work overseas, employees in the Foreign Service, including the newly incorporated category of AID employees, deserve the benefit of voluntary early retirement with a pension. It did not state that, because of the difficulties of overseas service, competence to perform diminishes with age.

seas and their relationship to the mandatory age 60 retirement provision. In fact, these studies made no examination of overseas conditions and their relationship to performance or even considered that issue. The focus of the 1954 study cited (Gov. Br. 16-17) was the comparative costs to the government of having separate retirement systems rather than one unified system with comparable pensions and other benefits. As appellants noted (Gov. Br. 16), the 1954 study was to determine "the necessity for special retirement provisions for selected employee groups, including overseas personnel." Contrary to appellants, the Committee did not provide a "more detailed description of the unusual factors that had prompted Congress to confer preferential retirement treatment on Foreign Service employees" (Gov. Br. 17). As the Committee report itself makes clear, the lengthy quotation on page 17 of the governent's brief, which is attributed to the Committee, was actually submitted to the Committee by a Foreign Service retired employee organization in support of its view that a separate Foreign Service retirement system was justified. In fact, the Committee's own conclusion, submitted to Congress was (S. Doc. No. 89, 83rd Cong., 2d Sess. 22 (1954)):

> While the Committee is inclined to the view that all employees assigned overseas serving under similar conditions should be treated equitably for retirement purposes, it refrains from making any specific recommendations in this area. The subject of overseas employment in all its aspects is, we understand, under consideration by the President's adviser on personnel management * * *.[21]

[21] The Committee's report also included a section summarizing all the provisions of the Foreign Service Retirement system, including those relating to voluntary retirement at age 50, and then

Similarly, the 1966 study, which was referred to by the appellants (Gov. Br. 19) and prepared by the Secretary of State and other Cabinet members, was concerned primarily in the Foreign Service section of the report with whether newly incorporated employees, such as USIA and Foreign Service staff employees, should be placed under the Foreign Service pay and retirement system or should remain under the Civil Service system. While the report contains the conclusory sentence quoted by the appellants (Gov. Br. 19) in the part of the report entitled "Summary Description of the System," this statement is not supported by any evidence. Moreover, the part of the report which contains the Committee's findings and recommendations neither discusses the basis for the mandatory retirement provision nor makes any conclusion about it.

Finally, appellants claim (Gov. Br. 20-21) that Congress recently reaffirmed that Foreign Service employees should be retired at age 60 because of the "unique requirements of the Foreign Service" when it excluded Foreign Service employees from the Age Discrimination in Employment Act (ADEA) Amendments of 1978, Pub. L. 95-256, which eliminated mandatory age retirement for all Civil Service employees. However, this contention is totally inconsistent with the

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contained the explanation set forth in the government's Brief (p. 17) that "These provisions were enacted in recognition of the needs of a career service and of the disadvantages of employment abroad." This statement was not focused primarily on the mandatory retirement provision and was not a conclusion of the Committee that mandatory retirement was based on diminishing competence due to overseas conditions.

legislative history of the ADEA Amendments. Its bipartisan sponsors agreed to an amendment by Congresswoman Spellman to delete the Foreign Service and other employees covered by separate retirement systems from the ADEA amendment at the request of the House Foreign Affairs and Post Office and Civil Service Committees as a matter of jurisdictional courtesy to allow those committees to review the potential impact of the amendments on the separate retirement systems covering those employees. Following Congresswoman Spellman's introduction of her amendment, Congressman Pepper, co-author of the ADEA amendments, spoke in favor of it and explained that he was doing so in accordance with the agreement reached with the other committees. He then went on to state (123 Cong. Rec. H9969):

* * *

> For the record I should state what might appear to be obvious; That we in the House in debating and passing this amendment are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement.

Similarly, Congressman Hawkins, the floor manager for the ADEA amendments, supported the Spellman amendment "to expedite consideration of this bill" and stated (*Id.*).

> By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes.

There was no discussion whatever of any "unique requirements of the Foreign Service" which might

justify a lowered retirement age. As the above debate shows, the sponsors of the measure expressly disavowed any intention to make a judgment on that issue. Appellants' reliance on the recently passed ADEA amendments therefore is wholly misplaced.

Apart from the fact that the legislative statements cited by defendants are largely inapposite, the most striking and significant fact about them is their conclusory nature. In not one single instance is there any reference to statistics, objective studies, medical records, or any other underlying data to support a conclusion that overseas work diminishes the competence of older Foreign Service employees.

This failure to base an earlier-than-normal mandatory retirement classification on underlying evidence is in marked contrast to action taken by it in establishing other such mandatory retirement statutes. For example, Congress has relied upon detailed scientific and empirical studies in establishing lower retirement ages for workers in jobs involving public safety. Thus, before establishing a mandatory retirement age of 56 for air traffic controllers, it relied upon studies by the Department of Transportation which examined all available data concerning the relationships between stress, age, and occupation, and tested the physiological impact of stress on air traffic controllers. H.R. Rep. No. 615, 92nd Cong., 1st Sess. 5-15 (1971).

Similarly, as the Second Circuit noted in *Airline Pilots Assn.* v. *Quesada,* 276 F.2d 892, 898 (1960), the Federal Aviation Agency undertook an empirical study before it enacted a regulation requiring airline pilots to retire at age 60. The agency based its decision on medical evidence in the record that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age 60 and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. Because of this, the Second Circuit held that the age 60 limit had a rational relationship to the FAA's job of protecting the public from air accidents.[22]

In contrast, here, the legislative history of the relevant statutes provides no support for an earlier retirement age. Coupled with the lack of evidence in the record to support retirement at age 60, this demonstrates that this requirement is not supported by an adequate factual basis for concluding that it is rationally related to a legitimate governmental objective.

D. The District Court Properly Applied the Rational Basis Standard of Review Formulated by This Court to the Factual Record Before It

As we have seen, in claiming that mandatory requirement at age 60 is required because of the severe burdens of overseas service, appellants have placed almost total reliance on inapposite and conclusory legislative

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[22] The record in *Murgia* also showed that the State of Massachusetts carefully reviewed its various retirement statutes affecting differing categories of state employees on a periodic basis and appointed study commissions to examine the underlying bases for differing retirement ages before enacting or amending the statutes, (427 U.S. 313, note 7). As this Court noted (at 315, note 9), the periodic fine-tuning of the state's maximum age limitations by state legislative commissions proceeded on the principle that "maximum retirement age for any group of employees should be that age at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." This is in direct contrast to the situation in the present case where no leigslative study of underlying facts has ever taken place, and no evidence submitted that 60 is the age at which the efficiency of a majority of Foreign Service employees declines to the point that it is in the public interest that they no longer work.

statements. The Department's argument seems to be that the existence of such statements is the end of judicial inquiry. They contend that the constitutional issue of rationality is a question of law (Gov. Br. 5) and that legislative conclusions should not be overturned on judicial review because a court disagrees with them (Gov. Br. 25).

We submit that, even under a minimum rational basis standard of review, a challenged legislative classification, while entitled to a presumption of validity, is not rational as a matter of law solely because the legislature has advanced a reason for enacting it. The rational basis standard of review requires judicial examination of whether the stated reason for the legislation bears a fair and substantial relationship to a proper legislative objective. *Reed* v. *Reed,* 404 U.S. 71 (1971); *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Trimble* v. *Gordon,* 430 U.S. 762 (1977); *Gault* v. *Garrison,* 569 F.2d 993 (7th Cir. 1977), *petition for cert. filed,* 47 U.S.L.W. 3059 (U.S. April 1978) (No. 77-1517). These recent decisions make clear that, under the minimum rational basis standard of review, courts must look beyond any superficially proffered justification to see whether the stated governmental goal is legitimate, whether the classification at issue bears a rational relationship to that goal, whether the nexus is substantial or tenuous, and whether the means used to achieve the goal, i.e., the classification itself, is fair and not arbitrary or based on an overboard generalization having no basis in fact.

The government's approach would make a mockery of judicial review of legislation challenged as irrational. As this Court noted in *Trimble* v. *Gordon, supra,*

in applying a minimum rational basis standard of review, "the scrutiny of the court is not a toothless one" (at 767) and "the Equal Protection Clause requires more than the mere incantation of a proper state purpose" (at 769). A *fortiori,* a classification is not immune from judicial review when the legislature has stated the reason in broad conclusory terms unrelated to any underlying facts or, as in this case, has not even advanced a reason for enacting it.

Thus, in the seminal case of *Reed* v. *Reed, supra* (at 75-76), Chief Justice Burger, speaking for a unanimous court, enunciated what has come to be the prevailing standard of equal protection review in cases not involving suspect categories such as race.[23] The Court quoted with approval from *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) that:

> The Equal Protection clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

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[23] Legal commentators have suggested in recent years that where a classification is based on a stigmatizing characteristic such as age, or restricts an important right, such as the right to work, the standard of review, though it would be less than in cases involving suspect categories or fundamental rights, should nonetheless require a closer scrutiny than in classification cases where such factors are not present. See, *e.g.*, Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection", 86 *Harv. L. Rev.* 1 (1972); Tribe, *American Constitutional Law,* Foundation Press (1978). If such a "heightened" standard of review were to be articulated by this Court, then we submit that this case is a particularly appropriate one to be subject to that standard.

As we have seen in *Murgia,* this Court examined the evidence in support of the state's claim that a lower retirement age for uniformed policemen bore a rational and substantial relationship to assuring public safety. The court found that the underlying factual evidence did support the government's claim and therefore upheld the validity of the statute.

However, a contrary result was reached by this Court in *Craig* v. *Boren,* 429 U.S. 190 (1976). In that case, this Court considered a state statute prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. This Court acknowledged the legitimacy of the proffered justification that the purpose of the statute was to enhance traffic safety and also the nexus between prohibiting beer to one class of drivers and reducing automobile accidents. Nonetheless, after examining the statistical and other evidence submitted by the state as support for the nexus, the Court found that the evidence was too tenuous and therefore the classification did not bear a "fair and substantial" relationship to the state goal (*id.* at 200, 201):

> However, appellees' statistics in our view cannot support the conclusion that the gender based distinction *closely serves* to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge. (Emphasis added).
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> * * *
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> . . . [T]he statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit".

Mr. Justice Powell, in his concurring opinion, similarly commented (*id.* at 211):

> I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a "fair and substantial relation" to this objective.
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> It seems to me that the statistics offered by [the state] . . . do tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Similarly, the case at hand is a "relatively easy case." No one questions the legitimacy or importance of the asserted governmental objective: the assurance of a vigorous and intellectually capable workforce. However, the state has totally failed to show that the classification at issue—the forced retirement of employees at the age of 60—bears a fair and substantial relationship to that objective because of the uniquely demanding nature of Foreign Service work overseas. Here, the government has not even attempted to submit any statistics or other objective evidence to support its claim that overseas work diminishes the competence of its older workers. The legislative materials consist, at

the very most, of the most general conclusions. In *Craig* v. *Boren,* the state at least submitted statistics to support its contention. Nonetheless, this Court found that they were too "tenuous" to sustain a finding of rationality. In that circumstance, Mr. Justice Stewart stated in his concurring opinion (429 U.S. at 215):

> The disparity created by these Oklahoma statutes amounts to total irrationality. * * * the disparate statutory treatment * * * without even a colorably valid justification or explanation, thus amounts to invidious discrimination.

We submit that the reasoning of this Court in *Craig* v. *Boren* is therefore *a fortiori* controlling here.[24]

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[24] Two recent court of appeals' decisions have applied the principles discussed above in mandatory retirement cases. In *Gault* v. *Garrison,* 569 F.2d 993 (1977), *petition for cert. filed* 47 U.S.L.W. 3059 (U.S. April 1978) (No. 77-1517), the Court of Appeals for the Seventh Circuit reversed a district court order dismissing a claim that Illinois law mandating retirement of school teachers at the age of 60 violated the equal protection clause. The court noted that this Court's decision in *Murgia* was controlling, that the decision in *Murgia* was based upon an evidentiary record showing the State's purpose and how the challenged legislation related to that purpose, and concluded that since there was no evidentiary record presented in the case before it, it could not uphold the age 65 classification as constitutionally valid. *Id.* at 996. The court noted that, without a record, even if it assumed *arguendo* that the purpose of the law was to remove unfit teachers, "Unlike the court in *Murgia,* we cannot say that the provisions in the instant case would eliminate any more unfit teachers * * * than a provision to fire all teachers whose hair turns gray." *Id.*

In *Houghton* v. *McDonnell Douglas Aircraft Corp.,* 553 F.2d 651 (9th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3357 (U.S. Nov. 28, 1977), the aircraft corporation claimed that mandatory retirement of its test pilots at age 52 was not a violation of the ADEA because the age limit was a bona fide occupational qualification for the job and therefore was exempted under the Act. In unanimously rejecting the corporation's claim, the Court of Appeals for the Eighth Circuit (comprised of retired Supreme Court Justice Clark and Judges Heaney and Webster) analyzed the statistical and other evidence underlying the corporation's claim and concluded that it was insufficient to support an inference of diminished ability among test pilots at age 52 to perform their work adequately. The court also noted that statistical studies showed that the accident rate of professional pilots decreases with age, that less than one percent of all aircraft accidents are traceable to medical disability, and of this one percent, the most frequent is gastroenteritis which bears no relationship to age. While the case arose under the ADEA, rather than the Constitution, its discussion exemplifies the kind of analysis which is appropriate in considering mandatory retirement statutes.

Appellees agree with Amicus AFSA (AFSA Br. 8) that mandatory retirement statutes which are permissible, like other classification statutes, do not have to be drawn with mathematical precision. *Murgia, supra,* 427 U.S. at 314, citing *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). We submit, however, that they must be within a range that is fairly drawn. As Judge Aldrich stated in the three-judge district court opinion in *Murgia,* 376 F. Supp. 753, 755 (D.C. Mass. 1974):

> But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other.

This Court's reversal of Murgia on the merits, and conclusion that the retirement age at issue was within a fair range, was not inconsistent with Judge Aldrich's statement of the applicable law.

Appellees submit that a retirement age of 60 for Foreign Service employees is outside the range of ages

where there is any evidence of a fair correlation between those ages and competence to perform the work of the Service. Indeed, the undisputed evidence is to the contrary. This evidence includes, *inter alia,* federal government studies showing no dimunition of abilities of white collar federal workers generally to perform their work between ages 60 and 70 and, indeed, showing that in many respects (judgment and dependability, for examples) the performance of workers in that age group is superior.[25] As we have seen, the present record also includes uncontradicted statements that older workers employed overseas by government and private industry and working under hardship conditions, and Foreign Service workers in particular, are at least as able, and in many respects better able, to be assigned to foreign posts and to perform the work there than younger employees with young families.

There is also the undisputed testimony of appellees' medical witnesses that overseas work does not diminish the ability of older Foreign Service employees to perform their work any more than younger employees because of climatic conditions and that medical disabilities occur to Foreign Service employees stationed overseas, and their dependents, at all ages. The statistical evidence in the record, based on information furnished by the appellants, shows that older Foreign Service employees between the ages of 55 and 60 serve in hardship posts in approximately the same proportion as do younger employees.

The growing trend in government, and in private industry, is to permit white collar workers to continue working at least until age 70. Indeed, with the recent

[25] Some of these studies are described in Argument III below.

amendments to the Age Discrimination in Employment Act, Foreign Service employees are likely to be the only white collar Americans, including those working overseas, required to retire as early as age 60 if appellants prevail in this appeal.[26]

In Murgia, this Court, in upholding the retirement law affecting uniformed policemen, noted (at 315-316):

> There is no indication that [the retirement provision] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

We submit that in this case, unlike the circumstances presented in Murgia, the record described above shows that the age 60 retirement provision has the effect of excluding from Foreign Service work so few officers

[26] The Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 95th Cong., 2nd Sess., (Sec. 3(a) amending 29 U.S.C. 631 and 633(a) and Sec. 5 amending 5 U.S.C. 8335 and repealing 5 U.S.C. 3322), raises the upper age limit for the prohibition of age discrimination from 65 to 70. Under the amendments, mandatory retirement at any age in the federal government, and below 70 for workers in state and local government, and in private industry, is permitted only if age is a bona fide occuational qualification for a particular job. Tenured university teachers can be mandatorily retired at age 65 until 1982 and certain high paid executives are also exempted after age 65.

Armed Forces personnel, like law enforcement personnel, are not covered by the ADEA amendments. They continue to be subject to lowered retirement ages, which, presumably, under this Court's decision in *Murgia,* is constitutionally permissible. However, even in the federal defense establishment, only the uniformed forces are subject to lowered retirement ages. Under the ADEA white collar civilian employees in the Defense Department and in the various military branches may not be mandatorily retired at any age. H. Rep. No. 95-527, 95th Cong., 1st Sess. 111 (1977).

who are in fact unqualified as to render the provision wholly unrelated to the object of the statute to maintain a competent workforce.

In sum, the district court below was entirely correct in stating that the rational basis standard of review "does not require judicial abdication" even though it does mean that the legislatively drawn distinction is "presumed valid" and that "its challengers have a heavy burden in proving its invalidity" (J.S. App. 3A.) The three judge court below further proceeded properly and in accordance with this Court's rulings in subjecting the Department's proffered rationale concerning the uniquely demanding nature of overseas work, including that set forth in legislative statements, to the test of whether the rationale in fact bore a fair and substantial relationship to the stated governmental objective of assuring competence. The court's unanimous conclusion that the proffered justification could "not survive even * * * minimal scrutiny" is amply supported by the record.

III

The Record Does Not Support Appellants' Claim That Mandatory Retirement at Age 60 Is Rationally Related to Assuring Competence Because It Assures More Capable Officers Being Promoted to High Positions, Enhances the Recruitment of Qualified Officers, and Creates Promotional Opportunities for Younger Officers, Thereby Enhancing Incentive and Morale

Appellants' alternative explanation of a rational purpose underlying the mandatory retirement statute (Gov. Br. 8-9, 26-29) is that it (1) assures more capable officers attaining high positions; (2) enhances the recruitment of qualified officers; and (3) creates promotional opportunities for younger officers and thereby enhances officer incentive and morale. No statement in

the legislative reports or debates underlying the 1948 Act that these were in fact the purposes of the retirement provision has been cited.

First, it should be noted that these explanations furnished by appellants are, on their face, inapplicable to non-officer staff employees and thus can provide no rational basis for their mandatory retirement at age 60.

Secondly, as we will see, there is no evidence in the record to support these explanations even as to officers. Consequently, the relationship between mandatory retirement and each of these goals—promoting more capable officers to high posts, enhancing recruitment of qualified officers, and enhancing officer incentive and morale—is not a substantial one. Moreover, they are largely based on old, overbroad, notions about the capabilities of persons as they grow older which have no basis in fact. We submit that a mandatory retirement classification for the purpose of promoting young persons which is based on the accuracy of such notions is discrimination *per se*. Even if the purpose of the classification is only to reduce the number of applicants for a limited number of positions, we further submit that the means of achieving the goal is itself arbitrary and therefore in violation of equal protection guarantees.

A. Appellants' Claim That Mandatory Retirement Assures More Capable Officers Attaining High Positions Has No Support In The Record Or Logic

Appellants' claim (Gov. Br. 26) that the mandatory retirement provision creates promotional opportunities for younger officers and thereby assists in the promotion of more capable officers to high positions. They state more specifically (Gov. Br. 27) that the "system

prepares and helps to identify the best officers for service at ambassadorial and other high levels." It is plain that this statement does not provide a rational basis for mandatorily retiring the majority of Foreign Service employees for whom ambassadorial or other high rank is not a realistic goal. Not only are the over 3,000 staff employees unlikely to become ambassadors, but not many officers can expect to achieve that goal either.[27] As we have seen, officers in ICA, AID, and in the State Department carry on a wide variety of functions, including, for example, arranging cultural

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[27] Senator Pell, floor manager for numerous measures affecting the Foreign Service, stated during hearings on S. 1791 (the Foreign Service Retirement and Disability System) before the Senate Committee on Foreign Relations, 93rd Cong., 1st Sess. 56 (Nov. 28, 1973):

> I have seen many classes of Foreign Service officers come up here and have told each one of them that the chances are that only about a tenth of them will get to be ambassadors and nine-tenths will not. They all seem to blanch and seem to think it very bad form to say that, but it is a fact. I think the Government is at fault leading them to feel that every Foreign Service officer has an ambassador's flag in his brief case, and I am wondering if one of the faults is not with us who recruit these young men * * *. When you go into the clergy, which is a service life, you don't go in to become a bishop; you go in to serve your communities and your faith and your belief.

A report by John Goshko in *The Washington Post*, Jan. 11, 1978, noted that over the last 45 years an average of 35% of the ambassadors have been appointed from outside the career Service. The article further noted that jet travel and instant communications have greatly reduced the autonomy of ambassadors and that now nearly all important policy making decisions emanate from the State Department in Washington. Lars Hydle, president of amicus AFSA, recently testified in Congress that 16 of the 22 top level positions in the State Department are currently filed by persons appointed by the President from outside the career Service. Hearings before the International Operations Subcommittee, House International Relations Committee, 95th Cong., 2nd Sess., Feb. 7, 1978.

exchange programs, providing technical assistance under the AID program, processing visas and other consular work, and supervising personnel offices, as well as serving in the more specialized political and economic cones. A statistical report published in the June 1974 issue of the *Department of State Newsletter* disclosed that during the years 1973 to 1974, 75% to 93% of the promotions to classes 2 and 3 were awarded to State Department officers in the political and economic cones. Officers in the consular and administrative cones during those years received only from 6% to 27% of the promotions to those classes.[28] Most officers outside of the political and economic cones in the State Department are unlikely to be promoted even to class 2, much less to ambassadorial, career minister, assistant secretary or other high policy making positions.

The legislative history of the Foreign Service Act provides no support for appellants' alternative argument that mandatory retirement creates promotional opportunities for younger officers and thereby assures the promotion of better officers to high positions. As we have seen, there was no discussion of the legislative purpose underlying the retirement provision when it was enacted as a minor section of a lengthy and detailed statute reorganizing the Foreign Service in 1946. The only reference in the legislative history of the 1946 Act cited by appellants to support their alternative argument (Gov. Br. 28) is a cryptic comment in the section of the House Report relating to selection

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[28] The remaining promotions went to officers in positions other than those in the economic, consular, administrative and political cones. See also the State Department's *Status of Women Report*, June 30, 1974.

out for poor performance, H. Rep. No. 2508, 79th Cong., 2d Sess. 91 (1946). That section states that selection out would not be extended to Class 1 officers because mandatory retirement was expected to achieve the desired turnover in that class. This statement indicates that Congress did intend in 1946 that mandatory retirement would be used in lieu of selection out based on performance for Class 1 officers.

The 1946 House Report contains no explanation why Congress considered it desirable to have turnover in the Class 1 ranks. Appellants' view (Gov. Br. 28) is that this shows a general legislative intent to ensure competence by enhancing the promotional opportunities for younger officers. The difficulty with this explanation is that (since there was no reference to any evidence that 60 year olds as a class were less competent than pre-60 year olds) it is wholly inconsistent with the underlying philosophy and purpose of the Act to reform the Foreign Service so as to ensure that all personnel decisions would be made on the basis of merit.[29]

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[29] The purpose clause of the 1946 Act states (22 U.S.C. 801):

> The Congress declares that the objectives of this chapter are to develop and strengthen the Foreign Service of the United States so as——
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> • • •
>
> (5) to provide that promotions leading to positions of authority and responsibility shall be on the basis of merit and to insure the selection on an impartial basis of outstanding persons for such positions;
>
> • • •
>
> (7) to provide salaries, allowances and benefits that will permit the Foreign Service to draw its personnel from all walks of American life and to appoint persons to the highest positions in the Service solely on the basis of their demonstrated ability . . . .

In any event, the turnover phrase applied only to Class 1 officers and thus is not an explanation for mandatory retirement of those officers who are not in that class. In addition, since the law was changed in 1955 (69 Stat. 25-26) to allow selection out of Class 1 officers on the basis of performance, this original rationale would no longer be apposite even as to Class 1 officers.[30]

As we have seen, appellants have submitted no evidence of a fair and substantial relationship between advancing younger officers to positions held by officers who reach age 60 and assuring competence in those positions. Appellees, on the other hand, have submitted substantial evidence, which is summarized above, that older Foreign Service officers are at least as well—and frequently better—equipped than younger officers to perform Foreign Service duties. In addition, the appellants' long-standing practice of utilizing post 60-year olds in the most important overseas positions in the diplomatic corps—the ambassadorships—belies their contention that young blood is needed "to main-

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[30] During the debates on the 1955 measure, Congressman Richards, the floor manager for the bill, stated that the purpose of allowing selection out of Class 1 officers was "to prune the deadwood and allow more capable younger men to move ahead" 101 Cong. Rec. 3557 (March 23, 1975). We submit that this statement does not indicate a legislative judgment that younger men, solely because of their age, would be more capable than older men in Class 1 but was simply a judgment that it should be possible to select out a less capable officer in Class 1 so that a more capable officer could replace him. Such a judgment would be entirely consistent with the stated purpose of the Act to make personnel decisions on the basis of merit. In any event, the purpose of the mandatory retirement provision was not in issue in 1955, and there was no consideration of any evidence justifying it.

tain a high quality diplomatic corps" (Gov. Br. 29).[31]

The credibility of appellants' argument is further seriously weakened by the fact that the Service uses a highly competitive system for entrance into the Foreign Service [32] and a selection out system that annually evaluates the performance of all officers, ranks them in numerical order, designates for potential selection out on the basis of poor performance those who are in the bottom rankings, and, in addition, selects out those officers who have remained in the same class without promotion for a designated period of time.

In addition, officers are subject to biennial medical examinations for physical and psychological impairments to continued service, including service overseas,

[31] From Benjamin Franklin who served as ambassador to France in 1800 at the age of 80 to the more recent appointments of Ellsworth Bunker to Vietnam at the age of 73, David Bruce to China at the age of 80, and Averill Harriman as ambassador at large at the age of 84, the Foreign Service has had a long history of utilizing the talents of persons past their 60th birthday at the highest levels of the Service.

[32] The Foreign Service entrance examination has traditionally consisted of a written examination, including a Foreign language test, a general ability test, and an English expression test, as well as an oral examination. In his statement before Congress this past year, Lars Hydle, president of AFSA, noted that "[t]he Foreign Service has traditionally been able to attract many more applicants than it can accommodate, and to select the best from universities, law and graduate schools throughout the country." Hearings before the International Operations Subcommittee, House International Relations Committee, *supra*. Testimony before the Senate Foreign Relations Committee revealed that approximately 11,000 applicants take the Foreign Service examination each year but that only 100 to 200 are finally admitted into the Service. Hearings on S. 179, Senate Foreign Relations Committee, 93rd Cong., 1st Sess. 69, Nov. 28, 1973.

and those who are unable to serve are involuntarily retired on medical grounds.[33]

The Service also offers the option of voluntary retirement with pension beginning at age 50 for those who themselves do not wish to stay in the Service (22 U.S.C. 1006). Far more officers retire before their 60th birthday than remain in the Service until age 60. The average age of retirement has been age 55. *Department of State Newsletter,* Sept. 1977. As a result of voluntary retirements, resignations before retirement age, deaths, and selections out, the record shows that as of February 28, 1976, only 51 officers and staff employees who were age 59 were on the rolls of the State Department (Pl. Ex. 5). From 1970 to 1975, an average of only 44 officers per year were involuntarily retired under the mandatory retirement provision (Def. Ans. to Int. 2). Those few officers who remain in the Service until age 60 do so because they have been in the upper ranks of their classes, have been regularly promoted because of their competence, have passed the requisite physical and mental health tests, and presumably still retain their enthusiasm for their work since they have chosen not to join the majority of their colleagues and retire voluntarily.

The suggestion of appellants (Gov. Br. 30) that mandatory retirement is needed to get rid of "deadwood" at the upper officer ranks in the Foreign Service is

[33] Non-officer staff employees are also admitted after competitive examination and are subject to separation if unable, because of medical reasons, to serve overseas. Promotion and assignments of staff employees are on the basis of performance reports. 22 U.S.C. 1016. While staff employees are not subject to selection out for failure to be promoted, they are subject to selection out for unsatisfactory performance. 22 U.S.C. 1021.

totally inconsistent with the Department's whole promotion and selection out system. Moreover, it is directly inconsistent with tLe statements of the Service itself. For example, in the Cabinet Committee study on federal retirement systems, which is cited by appellants (Gov. Br. 19), the Committee's recommendation section included the following statement (S. Doc. No. 14, 90th Cong., 1st Sess. 118):

> The Department of State reports that its best officers, because of their capabilities are given the most challenging assignments and generally choose to remain until they reach mandatory retirement age. It is the officers whose careers have leveled out and who are rated in the lower portions of their classes who request retirement before age 60.[34]

The Department's suggestion (Gov. Br. 30, note 31) that mandatory retirement is a more compassionate way of easing out 60-year old officers who have lost their competence then selecting them out on the basis of performance simply is not credible in a system where all officers are annually evaluated and periodically either promoted or selected out. Since the evaluations, promotions, and selections out for non-promotion are made on a comparative basis, rather than

[34] Although the Foreign Service Act gives the Department authority to extend the appointment of officers reaching age 60 for an additional five years, appellants have stated that in fact this provision is sparingly used to allow an officer to wind up an ongoing project and generally lasts for only a few months. They further stated that in the six years between 1972 and 1976, only 2 officers and one information officer were given extended terms (Def. Ans. to Int. 7). Thus, this provision of the Act has not been substantially utilized to retain competent 60 year olds while allowing less competent officers to be mandatorily retired.

according to an absolute standard, officers in the Foreign Service know and expect that only those scoring highest on evaluation reports will be promoted and that those scoring lowest will be selected out. It is extremely unlikely that their sensibilities after age 60 will be more offended at selection out than at a somewhat earlier age. Selection out for a comparatively inferior performance at any age undoubtedly has an adverse psychological impact on the individual adversely affected. Nonetheless, it is as rational to presume that Foreign Service Officers, no less than other people, would prefer to be measured on the basis of their performance and not on the basis of characteristics over which they have no control.[35]

Finally, we submit that unfounded notions about the capabilities of older workers cannot justify a mandatory retirement classification. As a Labor Department official stated: "The essence of age discrimination is the urge to get bright young people. No one perceives of himself as being discriminatory."[36]

[35] A special report of the House Select Committee on Aging, Mandatory Retirement: The Social and Human Costs of Enforced Idleness, 95th Cong., 1st Sess. 35 (August 1977), rejected the claim that mandatory retirement plans saves face for workers who are no longer capable of performing their work:

> . . . Even if competency-based retirement does stigmatize the retired older worker, one must ask, is it fair to shield a handful of workers from stigma by stigmatizing all workers who reach an arbitrary age? A second question is germane: Why, when administrators must every day evaluate the competency of the younger worker, does that task become so onerous when the worker reaches 65?

[36] Statement of Frank McGowan quoted in *Newsweek*, April 29, 1974, p. 42.

We submit that the evidence amply demonstrates that there is no connection between turning 60 and ability to perform work in the Foreign Service. In addition to the evidence in this record specifically applicable to Foreign Service employees, appellees called to the attention of the district court below a number of recent studies on the correlation between aging and the ability to work.

For example, an extensive study by the National Institute of Mental Health found that the intellectual ability of older workers, as measured by the Wechsler Adult Intelligence Scale, was superior to those of the younger groups in terms of verbal skills."[37] In his 1965 Report to Congress, the Secretary of Labor summarized studies of aging and productivity as follows:

> An analysis of the findings of these studies indicates that in factory work, entailing substantial physical effort, productivity decreased slightly in advancing age groups after age 45 and substantially after age 65 but that in office work and in mail sorting, productivity declined little, if any, up to age 60, and only slightly after that. In the study of performance of office workers, the oldest age group, 65 and over, actually had the best record.[38]

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[37] J. Birren, Human Aging: *A Biological and Behavioral Study* (1971). A memorandum from Dr. Birren was quoted in the ACLU amicus brief (p. 31, note 42) in the *Murgia* case stating: "While certain skills may be influenced by the change in speed with age, they appear very remote from those qualities that would distinguish the experienced professional, the educator, or such activities as the writing of books."

[38] *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965). See also *Research Materials* appended to that report.

Similarly, a study of 6,000 clerical workers which was designed to test the assumption that productivity declines with age, showed that workers in the older age group had a steadier rate of output and that older workers were as accurate in their work as younger persons. Kelleher and Quirk, *Age, Functional Capacity and Work: An Annoted Bibliography,* Industrial Gerontology (Fall 1973). A Civil Service Commission study of women in the federal civil service revealed that older women used less sick leave than younger women. Diane McClelland, "Opening Jobs Doors for Mature Women," *Manpower,* United States Department of Labor, 1975. Although scientific study of the relationships between aging and ability to work has begun only in recent years, the results to date show that the "performance of middle-aged and older persons is at least equal to and often-times noticeably better than younger workers." *Developments in Aging: A Report of the Special Committee on Aging,* United States Senate, 93rd Cong., 1st Sess. 72 (1973).

The House Report accompanying the recent amendments to the Age Discrimination in Employment Act, H. Rep. No. 527 95th Cong., 1st Sess. 4 (1977), noted that:

> Testimony to the committee cited the results of various research findings which indicate that older workers were as good or better than their younger co-workers with regard to dependability, judgment, work quality, work volume, human relations, and absenteeism; and older workers were shown to have fewer accidents on the job. As Congressman Pepper stated before our committee: "The Labor Department's finding that there is more variation in work ability within the same age group than between age groups justifies judging workers on competency, not age."

It is apparent that appellants' thesis that having younger officers at high levels in the Foreign Service assures competence rests upon "archaic and overbroad" generalizations about the capabilities of older employees that are more consistent with stereotyping than with contemporary realities. This constitutes discrimination *per se*. This Court in recent years has invalidated classification schemes adversely affecting women, illegitimate children, and unwed parents which were based on the accuracy of overbroad generalizations. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972). *Stanley* v. *Illinois*, 405 U.S. 645 (1972). As this Court stated in *Craig* v. *Boren*, *supra*, 429 U.S. at 198-199, referring to its earlier decision in *Stanton:*

> [I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.

Similarly, we submit that "loose-fitting" characterizations about the abilities of Foreign Service officers after the age of 60 cannot serve to justify a mandatory retirement classification based on the accuracy of those characterizations. Mandatory retirement can be justified only if there is evidence of a substantial relationship between the retirement age and the ability of most persons at that age to perform the particular work as this Court found there was in *Murgia*.

We believe that this Court in Murgia, implicitly but nevertheless clearly, rejected the argument that mandatory retirement is constitutionally permissible because it creates promotional opportunities for young persons.

The single district court judge in *Murgia*, in dismissing plaintiff's complaint as "insubstantial," accepted the State's contention that the Massachusetts statute was rational because it "enhanced the promotional opportunities of younger employees." 345 F. Supp. 1140, 1141 (1972). The three-judge court, on remand from the First Circuit, however, expressly rejected that rationale 376 F.Supp. 753 (1974).

On appeal, this Court did not adopt the reasoning of the single district court judge.[39] Instead of adopting this rationale, which would have simply settled the matter, it carefully analyzed the medical and other evidence concerning the ability of 50-year-olds to perform the strenuous duties of uniformed police work and concluded, on the basis of the record before it, that there was a fair and substantial relationship between the mandatory retirement age and the capability of post-50-year-olds to perform patrollman duties. Consequently, the three judge court in the present case did not commit reversible error when it unanimously concluded (J.S. App. 4A) that "promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme."[40]

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[39] The State of Massachusetts, which had relied on the rationale in the lower courts, repeated it in its Jurisdictional Statement to this Court (Docket No. 74-1044, J.S. 8) but did not press the matter in its brief.

[40] There is no issue in this case of promoting youth as an affirmative action to remedy past discrimination or to relieve deep-rooted unemployment. Here, we are concernd with an objetive of promoting younger persons solely because they are younger and presumed to be more capable on that account.

B. Appellants' Claim That Mandatory Retirement Enhances The Recruitment of Qualified Officers Has No Support In The Record Or Logic

Appellants claim (Gov. Br. 9) that mandatory retirement provides "attractive career prospects for qualified young persons." There is no evidence—in the record or elsewhere—to support this view. We submit that it is just as logical and reasonable to assume that the Service will have difficulty attracting qualified persons if it has a retirement requirement that threatens to cut short their careers at age 60 over their objections at the same time that advances in health and nutrition continue to extend life expectancy. Early forced retirement has a particularly serious impact on those persons in the Service wishing to continue to work since many Foreign Service personnel have highly specialized skills not easily translatable to other jobs.

Many Foreign Service employees are recruited into the Foreign Service as second careers. For example, Johannes Van den Berg, a plaintiff in this case, was recruited at the age of 47 to supervise Voice of America power stations after 16 years of experience as manager of field services for a large international corporation;

The House Report accompanying the 1978 amendments to the Age Discrimination in Employment Act, H. Rep. No. 527, 95th Cong., 1st Sess. 3 (1977), rejected the argument that mandatory retirement programs are proper because they help create jobs for younger people:

> Our present system . . . of forcing retirees to give their jobs to younger people simply trades one form of unemployment for another. Nor does depriving older and still capable Americans of jobs make any more sense than discriminating in employment against blacks, women, or religious or ethnic minorities.

Plaintiff Richard Olsen had been a foreign language teacher for many years when he joined the USIA at the age of 45. (Van den Berg. Aff., para. 1; Olsen Aff., para. 1). Many persons in the situation of Mr. Van den Berg or Mr. Olsen would have serious questions about making a second career in the Foreign Service if that career is to end at age 60 regardless of competence and desire to continue working."

Retirement can be especially disadvantageous to some women who do not start work until after their children are grown or after being widowed or divorced. Forced retirement limits the number of years of work for these women and reduces their ability to build up significant pension benefits.

It is not speculation to believe that these factors will affect recruitment. Although more and more Americans under age 60 who have the economic means to retire from full-time careers are doing so, recent polls show that the overwhelming majority of the population opposes mandatory retirement.[42] It is therefore likely, in the absence of any empirical evidence to the

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[41] At the time Van den Berg and Olsen entered the USIA, that agency was subject to the same retirement age of 70 as the rest of the Civil Service since the agency had not yet been brought under the Foreign Service Retirement and Disability System.

[42] The House Report accompanying the recent amendments to the Age Discrimination in Employment Act, *supra*, noted (p. 5) that a public opinion poll conducted by Louis Harris & Associates, Inc. in 1974 found that 86% of the American public agreed with the statement: "Nobody should be forced to retire because of age if he wants to continue working and is still able to do a good job." The report further noted that four out of five readers of Nation's Business responding to the question "Should retirement be mandatory at a certain age?" said no.

contrary, that a mandatory retirement plan, which removes the option to continue working, particularly at this unusually young age, makes the Foreign Service less attractive and thus impairs the Service's general recruitment activities rather than enhances them.

On the other hand, as we have seen, an average of only 44 Foreign Service officers remain in the Service until even their 60th birthday. Thus, as a practical matter, it is not likely that would-be officers are going to be deterred from joining the Foreign Service out of fear that appreciably large numbers of officers will work after 60 in the absence of a mandatory retirement law, and thereby deny them adequate promotional opportunities.

Appellants' allegation (Gov. Br. 31) that large numbers of 60-year-old Foreign Service employees are now staying in their jobs as a result of the district court's decision in this case below is highly misleading. Assuming that appellants' figures that some 80 employees have stayed during this past year are correct (they are not in the record and appellants cite no source for them), the appellants completely fail to point out that a recent substantial pay raise has temporarily slowed down the rate of all voluntary retirements because of the fact that Foreign Service pensions are based on the highest salary received for three consecutive years. Prior to February 1977, Foreign Service employees, like other Federal workers, were limited to a maximum annual salary of $36,000. In February 1977, the ceiling was lifted to $47,500. Thus, there has been a significant financial incentive to remain employed until February 1980. In recognition of this fact, amicus AFSA recently requested Congress to enact legislation permitting officers retiring between

October 1, 1978, and December 31, 1979, to compute their annuity on the basis of their highest single year of salary rather than, as is usual, on the basis of an average of the highest three years. The committee report discussing the proposal noted that its purpose was to alleviate an unusual and temporary slow-down in retirements. Sen. Rep. No. 842, 95th Cong., 2d Sess. 25."[43]

Certainly, in view of the fact that most Foreign Service employees have traditionally opted to retire voluntarily before 60, it is inherently incredible that more of them would now suddenly seek to stay on after 60 simply because of a court decision telling them that they may do so. Moreover, the government's own statistics indicate that most government employees do not choose to work beyond mandatory retirement age and that this reflects general societal retirement patterns."[44]

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[43] The Conference Report on H.R. 12598, the Foreign Relations Authorization Act for Fiscal Year 1979, H. Rep. No. 1535, 95th Cong., 2d Sess. 19 (Sept. 8, 1978), recommended the adoption of the proposal.

[44] Senate and House Committee reports on the recent amendments to the Age Discrimination in Employment Act summarized the trend in recent times toward early retirement. It was noted, for example, that in 1974, 72% of all new Social Security retirees opted for reduced benefits with age 62 as the overwhelmingly most common age. Sen. Rep. No. 493, 95th Cong., 1st Sess. 31 (additional views of Senator Javits). The House report noted that "[o]nly a few Federal employees choose to work up to or beyond mandatory retirement age." In 1976, only 1,509 workers under civil service were mandatorily retired. H. Rep. No. 527, 95th Cong., 1st Sess. 12.

C. Appellants' Claim That Mandatory Retirement Creates Promotional Opportunities For Younger Officers and Thereby Enhances Incentive and Morale Is Legally Invalid and Has No Support In The Record Or Logic

Appellants argument (Gov. Br. 8-9, 29) that mandatory retirement at age 60 is rational because it creates promotional opportunities for younger officers in a work force where there are few high level positions, and also thereby enhances their incentive and morale would equally justify any retirement age for any kind of employee regardless of any capability of human beings at that age to perform the work involved.

Appellants state (Gov. Br. 29) that the mandatory retirement age creates "room at the top" for younger employees. We concede that a variety of budgetary and management factors will ordinarily contribute to lack of "room at the top" in any government agency for all who desire to be there. As we noted above, there has been an increased number of appointments to the top positions of the Foreign Service in recent years from outside the pool of career officers. Budgetary restrictions and personnel ceilings imposed by the executive branch and Congress can also limit the number of promotions in any given year. Thus, we assume, *arguendo,* that there are more Foreign Service officers desiring ambassadorial and other high positions than there are positions to be filled. We further assume, *arguendo,* that reducing the number of applicants for governmental jobs is an objective having some legitimacy. We submit, however, that a mandatory retirement law does not survive the rational basis test simply because it reduces the number of applicants for a limited number of jobs. Since the means of achieving

the objective is arbitrary, the classification is inconsistent with equal protection guarantees.

In *Reed* v. *Reed, supra,* the disputed statute provided that where competing applications for letters of administration of estates of persons who died intestate are filed by both male and female members of the same entitlement class, the male was to be favored over female. The Idaho Supreme Court upheld the statute on the ground that it eliminated the need for hearings on the merits when two or more persons equally entitled sought letters of administration and thus reduced the workload on probate courts. Even though this Court conceded that the State's proffered justification for the statute could be said, as a matter of logic, to bear a rational relationship to a legitimate state objective, this Court nonetheless held that the classification violated the Constitution's equal protection guarantees. The Court stated (404 U.S. at 76):

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.

Appellants' suggest that the statute is valid because the promotion of younger officers enhances incentive and morale in the workforce. However, appellants have submitted no evidence that the retirement provision does in fact enhance incentive and morale. As Judge Aldrich noted in the three-judge court's decision in *Murgia,* 376 F. Supp. 753, *supra* (at 754-755):

> We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are

only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. * * * The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination *per se*.

The inherent conflict referred to by Judge Aldrich is reflected in this case. The collective bargaining representative for the officers in the State Department, AFSA, has filed an amicus brief in support of appellants. The collective bargaining representative for the employees in ICA, the American Federation of Government Employees (AFGE), has requested the Court's permission to file an amicus brief in support of appellees. The Thomas Fund, an employee organization whose membership consists of employees in all three foreign affairs agencies, is a plaintiff in this case. Ten employees are also plaintiffs in this case. Elsworth Bunker, a long-time career officer and currently Ambassador at Large, recently wrote:

> [T]he automatic retirement of a large number of our citizens who are willing and able to continue work is one of the more troublesome and inequitable problems of our time. While I appreciate the need to maintain a reasonable degree of opportunity for the advancement of young talent, it does strike me that we have been somewhat arbitrary in the past in denying to the nation the experience, creativity and productivity of senior Americans.[45]

[45] Hearings before the Select Committee on Aging, 95th Cong., 1st Sess., May 25, 1977 (letter submitted for the record, June 1, 1977).

Appellants further state (Gov. Br. 9) that mandatory retirement "creates incentives for superior performance." However, as we have seen, so few Foreign Service officers remain, or can reasonably be expected to remain, in the Foreign Service until even their 60th birthday that it is not logical to assume that officer incentive will be significantly affected by the elimination of mandatory retirement. Moreover, those few officers who elected to remain after age 60 will still be subject to selection out on the basis of performance and for medical reasons, and thus younger officers who are more capable than they will still have opportunities to succeed them and therefore will be motivated to demonstrate their capability. Moreover, those officers who are approaching age 60 and who wish to continued to work will be motivated to perform well in order to attain or retain interesting and challenging assignments and to keep from being selected out.[46] Indeed, they may well be more motivated than they are under a system where mandatory retirement looms in the future. We submit that the record in this case provides no basis for concluding that it is necessary to provide incentives and protect the morale of the Service by advancing one group of employees at the expense of others on the arbitrary criteria of age rather than on the criteria of merit.

[46] The Foreign Service, unlike most government agencies, has broad administrative flexibility in making assignments. As amicus AFSA notes (AFSA Br. 6), a Foreign Service officer can be assigned to perform any job in the Foreign Service regardless of rank. Thus, a Class 3 officer may well be assigned to perform work previousiy performed by a Class 2 or a Class 4 officer. An officer may be assigned to any overseas post and may be reassigned in the interests of the Service at a moment's notice. He or she may also be assigned to work in other federal agencies (22 U.S.C. 961a), in State, county or municipal governments, in private organizations (22 U.S.C. 966), and to universities (22 U.S.C. 963).

Appellants seek (Gov. Br. 28) to draw support for their argument that failure to mandatorily retire 60-year-olds will lower the opportunities for advancement and the morale of younger officers seeking quick promotions from this Court's decision in *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975). That reliance is misplaced.

Schlesinger v. *Ballard* involved a selection out provision in federal law governing the United States Navy that required certain male naval officers who twice failed to be promoted to be mandatorily discharged. A naval officer discharged under this provision complained that women naval officers were entitled to a longer period of time than male officers in which to be promoted and that his selection out was therefore a denial of equal protection. This Court held, for reasons not material here, that the statutory distinction between men and women naval officers had a rational basis. In describing the Navy's promotion and selection out procedures for failure twice to be promoted, this Court noted (419 U.S. at 502):

> Because the Navy has a pyramidal organizational structure, fewer officers are needed at each higher rank than were needed in the rank below. In the absence of some mandatory attrition of naval officers, the result would be stagnation of promotion of younger officers and disincentive to naval service. If the officers who failed to be promoted remained in the service the promotion of younger officers through the ranks would be retarded. Accordingly, a basic "up or out" philosophy was developed to maintain effective leadership by heightened competition for the higher ranks while providing junior officers with incentive and opportunity for promotion.

This Court did not say in *Ballard* that in any governmental organization having fewer jobs at the top than the bottom, any sort of mandatory attrition program, regardless of how arbitrary, is justified in order to advance those at the bottom to the top regardless of merit. Rather, the Court described a selection out system that involuntarily retires employees on the basis of merit, not a system involuntarily retiring employees on the basis of age for which there is no evidence of any relationship to merit. As we have seen the Foreign Service has the capability to carry out such a system of merit selection, as was described by the Court, by selection out for time in class (*i.e.,* lack of promotion) and for poor performance. There is nothing in *Ballard* which suggests approval of going beyond such decisions on the basis of merit to using the arbitrary criterion of age.

Moreover, appellants are in error in suggesting (Gov. Br. 28-29) that the Navy and Foreign Service personnel systems are so similar that unless there is mandatory retirement there will be stagnation in the Foreign Service comparable to that which would result in the Navy if officers failing to be promoted were not selected out. Unlike the Navy system described in *Ballard,* Congress has not established any fixed number of officers for any class. Instead, the appellants have broad administrative flexibility under the Act (22 U.S.C. 886) to determine the number of positions in each class. In deciding how many promotions there should be to each class, appellants make annual determinations, taking into account a wide variety of factors such as budgetary levels, the management needs of the Service, the number of appointments and transfers from outside the career Service, the numbers and varying talents of the existing workforce, the estimated

numbers of departures for all reasons, and other variables."[47]

Appellants' argue (Gov. Br. 29) that a younger officer must be promoted in order to stay in the Service. It is true that an officer whose performance ratings year after year are insufficient to earn a place on the promotion list will be selected out. However, the appellants have broad authority under the Act (22 U.S.C. 1003) to determine administratively the number of years in which officers may remain in class without promotion. The appellants can and do adjust these periods and have tolled selection out for officers who have been recommended for promotion but for whom there have been no positions available in the next higher class."[48]

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[47] A description of this process is set forth in the March, 1978 issue of the *Department of State Newsletter*, p. 5.

Amicus AFSA is in error in stating (AFSA Br. 10) that promotions are available only when an officer leaves a class, as is the case in the Navy where the number of positions at each rank is set by statute, and that when an officer is retired this opens up promotions throughout the system. In fact, as noted above in the text, the number of promotions available to a particular class in the Foreign Service is administratively determined each year and the determination is made on the basis of a number of factors other than retirements including an administrative determination of the numbers desired by appellants to be in each class. Thus, the total numbers in any given class will vary from year to year. Similarly, an officer's departure does not necessarily mean that an officer will be promoted to take his or her place.

[48] For example, in 1969, officers in classes 4 and 5 were permitted to stay in class for 8 years without promotion (unless they were selected out for low ranking). In 1976 appellants changed the rule administratively to permit officers in classes 3, 4 and 5 to remain in any combination of those three classes for 20 years and in any one class for 15 years. Each ICA officer in classes 2-5 was also given an additional year for each year he was recommended for promotion but not in fact promoted. See discussion of these changes in *News and Views*, Local 1812, AFGE, Nov. 8, 1976.

Appellants' final suggestion (Gov. Br. 29, note 30) that mandatory retirement allows them to plan the training and advancement of their employees is simply not credible in light of the many unpredictable variables they now have to take into account apart from mandatory retirement in planning for utilization of the workforce."[49]

In sum, there is no basis in this record for concluding that promotional opportunities would be significantly interfered with by elimination of mandatory retirement at age 60. Similarly, there is no basis for concluding that Service morale or incentive, or the Service's need to plan, depends on mandatory retirement. Moreover, even if it is assumed that mandatory retirement will have the necessary result of creating promotional opportunities for some younger officers, a classification for the purpose of benefiting younger employees over older ones on the sole basis of age is discrimination *per se* and thus it does not bear a fair relationship to a legitimate governmental end.

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[49] The special report of the House Select Committee on Aging, Mandatory Retirement: The Social and Human Cost of Enforced Idleness, supra, p. 35, states that the notion that mandatory retirement plans create an element of predictability is questionable when examined closely.

> Since persons may become ill, change jobs, or voluntarily retire any time before the mandatory age and since companies now chart, project and adapt to such behavioral patterns, the contention that mandatory retirement introduces necessary predictability into the system would seem to have little merit. Patterns of voluntary and involuntary retirement would emerge once mandatory retirement is abolished. If the assumption underlying this contention were correct, companies which have banned mandatory retirement would now be floundering in chaos. They are not.

IV

This Case Involves Narrow Issues Concerning the Factual Basis for a Mandatory Retirement Age for One Particular Group of Employees

We emphasize that the parameters of appellees' equal protection challenge are narrowly drawn. Appellants are therefore in error when they claim (Gov. Br. 29) that this challenge is essentially an argument for eliminating mandatory retirement altogether. Appellants have asserted only that they are entitled to work until age 70 and that there is no evidence of any diminished capacity to perform the work of the Foreign Service, including work overseas, between the ages of 60 and 70. This case does not encompass the question of whether Foreign Service employees above the age of 70 can be mandatorily retired consistent with the requirement of equal protection. This issue was not argued below, evidence was not introduced on this issue, and the district court's ruling states only that appellants may not mandatorily retire appellees prior to the age of 70 (J.S. App. 8A.). Thus, appellants are correct (Gov. Br. 11) that we do not claim in this case that legislatures are prohibited from establishing a general mandatory retirement age for white collar workers such as the age 70 mandatory retirement provision that existed for all Civil Service employees at the time this suit was instituted. Appellants are mistaken, however, in suggesting (Gov. Br. 12) that we concede that an age 60 retirement law, if applicable to all government employees, would be valid. It can be reasonably argued that, given modern societal facts, any general mandatory retirement age for white collar workers below the age of 70 is presumptively invalid and can be ruled valid only if there is factual evidence

to justify the lowered age. At the very least, such a statute would have to be supported by an adequate factual basis having more, or at least many, workers at age 60 who are no longer able to perform adequately. It is exactly this evidence which is missing here. It can also be reasonably argued that all mandatory retirement laws for white collar workers at any age are invalid and individualized determinations should be made instead. However, these issues are not present in this case and appellees, therefore, take no position on them.

Contrary to appellants' claim (Gov. Br. 12), we do not contend that legislatures cannot set different retirement ages for differing groups of employees. So long as there is a rational basis to sustain each retirement age, there can be any number of them.[30] The gravamen of appellees' complaint is that there is no evidence of a rational basis in this case to sustain retire-

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[30] It is of course immaterial whether the differing retirement ages are set forth in a single statute or in separate statutes. In *Murgia*, this Court held that the state statute which established a separate employment and retirement system for that group of state employees serving in the uniformed branch of the state police force survived an equal protection challenge that the separate classification was irrational because of the undisputed difference in work demands that underlay the job classification. 427 U.S. at 315, note 8. Similarly, it does not matter whether the present case is viewed as one in which the legislature has in a single statute—the Foreign Service Act—provided for differing treatment of those under 60 and those over 60, or one in which the legislature has by separate statutes established one rule for 60 to 70 year old government employees performing white collar jobs generally and another rule for 60 to 70 year old employees performing comparable white collar jobs in the Foreign Service. Absent an evidentiary showing, like that in *Murgia*, that the work in the Foreign

ment of Foreign Service employees between the ages of 60 and 70.

Similarly, appellants are in error when they state (Gov. Br. 34) that the district court "ruled that Congress could not constitutionally maintain different mandatory retirement ages" for differing categories of government employees. The district court simply held that the evidence in this record demonstrated that the age retirement provision at issue lacks a rational basis. The court did not rule that the government is prohibited from providing for early retirement in the cases of policemen, firemen, air traffic controllers, Armed Forces personnel, or other persons in demonstrably hazardous jobs such as the uniformed patrolman's job in *Murgia* where declining physical ability due to advancing age can fairly be said to pose a risk to the public safety. Indeed, it is still open to the Government to demonstrate that some particular jobs in the Foreign Service are in this category.[51]

The appellants' claim (Gov. Br. 34) that, if the district court's decision is upheld, it "could lead to invalidation on equal protection ground of all distinctions between the Civil Service and the Foreign Service" is

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Service is so demanding that post-60 year olds cannot perform it as ably as younger employees or that the work is so much more demanding than the jobs required of other, more favorably treated, government employees, the lowered retirement age is invalid.

[51] Procedures are available to appellants under ADEA to establish age limitations for specific jobs. The Act allows an age limitation to be set upon a showing to the Civil Service Commission that age is a bona fide qualification for a particular job. 5 U.S.C. 633a, as amended.

also without merit. Neither the *Murgia* case nor *Kelley* v. *Johnson,* 425 U.S. 238 (1976), cited by appellants (Gov. Br. 35, note 35), nor any other case of which we are aware, supports the appellants' view. If there had not been sufficient evidence to establish the rationality of the age limit in *Murgia,* or the hair length requirement in *Kelley,* a decision by this Court to that effect would not have meant the constitutional invalidation of all distinctions between the state police forces in those cases and other state government employees. Similarly, in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) this Court's invalidation of an employment condition affecting pregnant women (requiring them to retire when six months' pregnant) did not mean elimination of all distinctions between the state school teacher employment system and all other state government employment systems. Similarly, the decision below does not prohibit the government from legislatively creating different employment rules for different jobs. The armed forces, the Postal Service, the Peace Corps, the Health Service, and other employee groups can continue to be subject to their own separate employment rules and conditions.[52] The Foreign Service can continue, as the district court specif-

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[52] The decision below does not prohibit the government from setting a term of years in which an employee can serve in any particular job. For example, by statute individuals can be employed in the Peace Corps for not more than five years, 22 U.S.C. 2506(a)(2). (However, such employees can serve five years even if they are aged 65 or 70 and thus the classification does not discriminate on the basis of age.) Congress similarly can limit service in the Foreign Service to a term of years if it so chooses. So long as such term of service is not irrationally predicated upon age, when age has no bearing on ability to perform the jobs in question, such a provision would presumably be valid.

ically recognized (J.S., App. 8A) to have its own distinctive recruitment, promotion, pay and selection out features. Thus, Congress can offer higher pay and the option of earlier retirement to Foreign Service personnel as a recruitment device to offset the inconvenience of moving many times and living away from the United States for periods of time, and to offset the uncertainties of pursuing a career which includes annual reviews and selections out. Such benefits serve the rational governmental purpose of recruiting well-qualified personnel into the Foreign Service.

Nor does the decision below in any way limit the government's ability to hire, to promote, to assign, to demote, and to discharge on the basis of ability to perform. President Carter has recently proposed a reorganization of the Civil Service, H.R. 11280, 95th Cong., 2nd Sess. (1978). One feature of the new proposal is the establishment of a category of high-ranking civil servants who will be rewarded and promoted according to performance and who will be demoted to lower rankings if their performance is inadequate. Similarly, there is nothing to prevent the Foreign Service from instituting such demotions. As we have seen, the appellants already have authority to assign employees to any post and to perform any work, regardless of rank. And, of course, the decision in no way limits the Foreign Service's already existing authority to select out officers on the basis of performance. Similarly, the decision in no way limits the existing authority of the Foreign Service to discharge its personnel for medical reasons.

V

There Is No Support in the Record or in Law for Appellants' Claim That Mandatory Retirement at 60 Is Rational Because the Foreign Service Employment System Provides Special Advantages

Appellants contend (Gov. Br. 32) that since Foreign Service employees enjoy "numerous special advantages" from employment in the Foreign Service that they would not receive under other government employment systems, they cannot complain about any condition of that employment. We submit that, even if it were true that Foreign Service employees are advantaged over other government employees, which we dispute, this fact is irrelevant in an equal protection case.

We know of no equal protection case in which this Court has held that merely because one is obtaining some benefits under the statute at issue, one may not challenge discriminatory aspects of it. If that were the law of the land, then this Court in *Murgia* would simply have disposed of the plaintiff policeman's equal protection claim on that basis. As we have been, this Court, in *Murgia* and in other cases, has analyzed whether the classification bears a fair and substantial relationship to a legitimate governmental objective and is not itself arbitrary. Appellants cite no precedential authority for its contention that the existence of other advantages arising from the employment is relevant to that analysis. Nor does it matter whether the benefits derived under a challenged statute are better than might be derived elsewhere. Surely, if an agency hired women for low ranked jobs at better pay than they could receive elsewhere for the same work but refused to promote them on the ground that they were women, they would not be barred from challenging the constitutionality of the non-promotion policy because they were receiving better pay.

Moreover, no evidence was introduced below concerning the advantages and disadvantages of Foreign Service employment. In fact, we submit there is no basis to support appellants' contention here that Foreign Service employees are appreciably advantaged over other government employees. Indeed, as the report on federal employment systems cited by appellants notes, the Foreign Service System has consistently lagged behind the Civil Service system in extending benefits to its employees. S. Doc. No. 14, 90th Cong., 1st Sess. 129 (1967).[53]

Appellants point (Gov. Br. 32) to the fact that the annuity for Foreign Service employees is based on 2% of the highest three-year average salary and that the Civil Service annuity is computed on the basis of 1.5% for the first five years, 1.¾% for the second 5 years, and 2% thereafter. They neglect to point out, however, that the Foreign Service total annuity is limited to a maximum of 70% of average pay whereas the Civil Service employee is permitted up to 80% of his average pay and that the Foreign Service employee

[53] The Rogers Act of 1924 required Foreign Service employees to contribute 5% of their earnings to their retirement system as compared to the 2½% required of Civil Service employees. This formed the model for treating Foreign Service employees on less favorable terms that continued in the following decades. For example, for many years, the Foreign Service Retirement System did not grant annuity benefits to dependent children of Foreign Service employees who died in service or during retirement or grant any annuity benefits to widowed husbands of female Foreign Service employees even though, under the Civil Service laws, such dependent spouses and children were eligible for annuities. Similarly, in 1962, the Civil Service raised a widow's survivorship benefits from 50 percent to 55 percent of an employee's average salary and extended survivorship benefits to student dependent children until they reached the age of 21 These benefits, however, were not extended to the Foreign Service until 1976. 22 U.S.C. 1065.

may not include more than 35 years of government service whereas the Civil Service employee may include all years of service. As a result of this and other differences in computing their annuity, a Civil Service employee who has consistently maintained equivalent positions to a Foreign Service employee may earn a larger annuity than the Foreign Service employee. For example, an individual who has been employed by the Civil Service since age 25 and whose highest three-year average salary was $25,000 will receive an annuity of $19,062.50 per year if he retires upon reaching age 65. On the other hand, a Foreign Service employee who commenced working in the Foreign Service at the age of 25 and whose highest three-year average salary was $25,000 would receive a maximum annuity of only $17,500 per year upon mandatory retirement at age 60.[54] In addition, the Foreign Service employee, who cannot continue his career past the age of 60, is thus required to live during the five year period between 60 and 65 on a substantially lower income (that is, an annuity income) than that earned by a comparable employee in the Civil Service who continues to work. Even if the Civil Service employee chooses to retire at the age of 60, he will earn an annuity of $16,562.50 per year, or only $937.50 per year less than the annuity

[54] The Foreign Service annuity is computed on the basis of 2% of the average salary for the highest three consecutive years of service, multiplied by the number of years served, not to exceed 35. 22 U.S.C. 1076. The Civil Service annuity is computed on the basis of 1.5% of the average salary for the highest three years, multiplied by the number of years not to exceed five years, plus 1.75% of the employee's average pay multiplied by the number of years of service which exceed five but do not exceed 10, plus 2% of the average pay multiplied by the remaining number of years of service. 5 U.S.C. 8339(a).

issued to a comparable Foreign Service employee. Inasmuch as the Foreign Service employee probably assumed greater inconveniences and job security risks than the comparable Civil Service employee—such as being subject to changing world assignments, and to selection out at any time—the small difference in retirement pay is hardly a substantial advantage.

There is also no factual basis for appellants' claim (Gov. Br. 33-34) that appellees are attempting to "improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions." As we have seen, the conditions of Foreign Service employment in the aggregate are not necessarily more favorable than comparable Civil Service conditions. We presume that appellants are referring to the option in the Foreign Service of early voluntary retirement at age 50 when they refer to "favorable conditions" since Civil Service employees may not voluntarily retire with pension until age 55. Even if we assume that the option of early voluntary retirement at age 50, when considered by itself, is a more advantageous employment benefit than that which exists in the Civil Service, those Foreign Service employees who continue to work after age 60 (and are not subsequently selected out or medically discharged) will be foregoing that benefit. Obviously Foreign Service employees will not be able both to work past age 60 and choose voluntary early retirement. Thus, appellants are not attempting to obtain the alleged special benefit of the Foreign Service retirement system without accepting its disadvantages.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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